Revised Rules, Special Sub-Committee of the Rules Committee

Re: Williston report:
3 Column Material
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v.2

Revised rules, Special Sub-
Committee of the Rules Committee

REVISED RULES OF CIVIL PROCEDURE

RULE 56 DIRECTING A REFERENCE

COMMENTS

RULE 56 DIRECTING A REFERENCE

Note on terminology

The rules define "judgment" as including an order, whereas the Working Group suggests that in ordinary use, the word "order" is taken to include a judgment: all judgments are orders, but not all orders are judgments. The Williston draft, reflects the existing Judicature Act, in which "judgment" is defined to include an order. In an earlier draft of the Williston rules, this definition appeared in the enforcement rules. Rather than expand "judgment" to include "order" for the enforcement rules alone, it was decided to defined "judgment" as including orders for all purposes.

The Working Group proposes (A.M. Rock dissenting) that the use of "judgment" should be confined to the commonly understood use of the word (the final disposition by the court of the merits of the dispute) and that "order" be used as a broader generic term. This is the approach used in British Columbia. In Nova Scotia, the rules use "order" as the general term and confine the use of "judgment" to the formal document that ends an action.

The Working Group has had a computer search done to pick up all references to "judgment" and "order" in the Williston rules.

The Working Group further poses the following question: Is there any need to continue the distinction between judgments and orders, given that execution can issue on an order and that an appeal lies to the Court of Appeal from "any final judgment or order" of a Supreme Court judge (existing Act, s. 28)?

WILLISTON'S PROPOSED RULES

56

REFERENCES

RULE 56 DIRECTING A REFERENCE

Revised Rules of Civil Procedure

Reference of whole proceeding or an issue

56.01(1) A judge may at any time refer a whole proceeding for trial or direct a reference to determine an issue in a proceeding where,

(a) all affected parties consent;

(b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made by the trial judge or a jury; or

(c) a substantial issue in dispute requires the taking of an account.

Comments

56.01

- This rule has been redrafted to give it greater clarity and to resolve certain problems inherent in Williston 56.01 i.e.

- There was a conflict within Williston 56.01: the opening words said "subject to any right to have an issue tried with the jury" but 56.01(a)(ii) then went on to talk about a prolonged examination etc. that cannot be conveniently made by a jury. Looking at 56.01 overall the jury trial qualification does not seem to be really relevant since intention of each of the provisions seems to be to override the right to jury trial. The reference to "subject to any right to have an issue tried with a jury" has been deleted.

- Williston 56.01(a)(i) permitted a reference where all parties, not under disability, consent. Present J.A. s.72(a) dealt with the situation where there was a party under disability by specifically authorizing a judge to refer where all the other parties consented. Why not allow the litigation guardian to consent on behalf of the party under disability? This can be achieved by simply providing that the reference may take place where all parties consent.

Williston's Proposed Rules

56.01 Where a Reference May be Directed

Subject to any right to have any issue tried with a jury, a judge may, at any time,

(a) direct a reference to determine any question or issue arising in a proceeding, or refer the whole proceeding for trial where,

(i) all parties, who are not under disability, consent;

(ii) a prolonged examination of documents or a scientific or local investigation is required that, in the opinion of the judge, cannot conveniently be made by the trial judge or a jury; or

(iii) a substantial issue in dispute requires the taking of an account;

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
Reference of an issue (2) A judge may at any time direct a reference to determine an issue in a proceeding relating to, (a) the taking of accounts; (b) the conduct of a sale; (c) the appointment of a committee, guardian or receiver; (d) the conduct of a committeeship, guardianship, or receivership; or (d) the enforcement of an order.	- Williston 56.01(b) provided for the directing of a reference for the appointment of a committee, etc. Messers. Mayer and Robertson (who assisted the Working Group by making comments on Rule 41 Receivers) pointed out that there should be a provision empowering a judge to direct a reference of the conduct and supervision of a receivership. An amendment has been made to allow for this. - Note that 56.01 changes the existing law. Under present J.A. s.72(1) a judge has a general power to refer <u>any question</u> for inquiry and report. Under 56.01 the only unlimited power to refer particular questions (without consent) is with respect to those set forth in Williston 56.01(b). This was intended by the Williston Committee. However, contrast the different situation in family law cases under 72.21 and 73.06 - a High Court judge has unlimited power to refer any question relating to corallary relief. Does this represent a consistent approach? For example, should the family law provision be qualified by "consent of the parties"?	(b) direct a reference for the taking of any accounts or the making of any inquiries in connection with the conduct of a sale, the appointment of a committee, guardian or receiver, or the enforcement of any judgment.

56.02

- S. J. Coo raised, in the context of this rule, a problem relating generally to local masters. Williston Committee dealt with the appointment of local masters in J.A. s.86 in terms similar to present J.A. s.99d. However, s.99d(2) was omitted (it provides that where no master or local master has been appointed for a county, the county court judge is the local master). Since the present practice is to appoint all county court judges as local masters perhaps the omission of s.99d(2) was justified. The simplest and clearest way to deal with this problem could be to include in (new) s.86 a provision analogous to (new) s.90(1) i.e. make all county court judges ex officio local masters except where a local master has been appointed for the county. This matter will be resolved by some change to the Judicature Act.

To Whom Reference May be Directed

Supreme Court

56.02(1) In a Supreme Court proceeding, a reference may be directed to a local judge, master, local master, [local registrar] or person agreed on by the parties.

56.02(1)

- Courts Administration pointed out that today under present J.A. s.97 registrars, local registrars and deputy registrars are all official referees, but under Williston 56.02(1) they are no longer persons to whom references may be directed (except on consent). Working Group. Williston Committee may have deliberately omitted them on the ground that they are not legally trained. However, by 56.02(2) in county court

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56.02 To Whom Reference May be Directed

(1) In a Supreme Court proceeding, a reference may be directed to a local judge, a master, a local master or to a referee agreed upon by the parties.

proceedings a reference may be directed to the clerk. Should local registrars be added to 56.02(1)?

- Working Group. For clarity "person" agreed on by the parties has been substituted for "referee" agreed upon by the parties.

56.02(2)

County Court

(2) In a county court proceeding, a reference may be directed to the referring judge or another judge, the clerk of the court or a person agreed on by the parties.

- Working Group. Williston 56.02(2) authorized a county court reference to a local master. Is this proper since the local master is not a county court officer. Usually the local master will be the county court judge so is it better to say "to a judge"? The rule should provide that a judge can refer the matter to himself, but what about referring it to another judge - should he only be able to do this with the consent of the other judge?

Where there are, outside Toronto, masters or non-county court judge local masters, does it make pragmatic sense to allow a county court reference to such a person [notwithstanding that they are not county court officers]?

(2) In a county court proceeding, a reference may be directed to the local master, to the clerk of the court or to a referee agreed upon by the parties. Where the judge directing the reference is a local master, the reference may be directed to himself.

Revised Rules of Civil Procedure

Person Agreed on by Parties

(3) Where a reference is directed to a person agreed on by the parties, he is, for the purposes of the reference, an officer of the court directing the reference.

(4) The judge directing a reference to a person agreed on by the parties shall determine his remuneration and the liability of the parties for payment of it.

ORDER OF REFERENCE

56.03(1) An order of reference shall specify the nature and subject matter of the reference and who is to conduct it, and may,

(a) direct in general terms that all necessary inquiries be made, accounts taken or costs assessed, as the case may be;

(b) contain directions as to the conduct of the reference, and

(c) designate which party is to have carriage of the reference.

(2) An order directing a reference in general terms confers on the person conducting it all the powers given by these rules to a person conducting a reference.

Comments

56.03

- Williston 60.03(dealing with the form of judgments) contains sub-rules (6) and (7) referring to matters that could be incorporated in a judgment directing a reference. These provisions have been transfered and incorporated into revised rule 56.03 as this seems to be a more appropriate place for them.

Williston's Proposed Rules

(3) Where a reference is directed to a referee, he shall be deemed to be, for the purposes of the reference, an officer of the court directing the reference.

(4) The judge directing any reference to a referee shall determine his remuneration and the liability of the parties for the payment thereof.

56.03 Judgment or Order of Reference

In addition to defining the nature and subject matter of the reference, the judgment or order of reference may contain directions as to the conduct of the reference and may designate which party is to have carriage of the reference.

60.03(6) A judgment directing a reference may direct in general terms that all necessary inquiries be made, accounts taken and costs taxed as the case may be.

(7) A judgment directing a reference in general terms shall have the effect of conferring upon the person to whom the reference has been directed all the powers given to any such person by these rules.

Motions on a Reference

56.04 A person conducting a reference shall hear and dispose of any motion made in connection with the reference, but in his absence or with his consent such a motion may be heard and disposed of by any judge, local judge, master or local master of the court in which the reference was directed.

Report on Reference

56.05 A person conducting a reference shall make his findings and embody his conclusion in the form of a report.

Confirmation of Report

56.06(1) A report has no effect until it has been confirmed.

(2) Where an order directing a reference requires the person conducting it to report back to a judge, the report may be confirmed only on a motion for judgment.

56.06(2)

- The order of Williston 56.06(2) and (3) has been reversed for clarity.

56.04 Motions on a Reference

Any person to whom a reference has been directed shall hear and dispose of any motion made in connection with the reference, provided, however, that in his absence or with his consent such a motion may be heard and disposed of by any judge, local judge, master or local master of the court in which the reference was directed.

56.05 Report on Reference

Any person to whom a reference has been directed shall make his findings and embody his conclusion in the form of a report.

56.06 Confirmation of Report

(1) A report shall have no effect until it has been confirmed.

(3) Where the judgment or order directing a reference requires the person to whom the reference is directed to report back to the judge directing the reference or to a judge of that court, the report may only be confirmed on a motion for judgment and there shall be no right of appeal from the report itself, but an appeal may be taken from the disposition of the motion for judgment.

Revised Rules of Civil Procedure

(3) Where an order directing a reference does not require the person conducting it to report back to a judge, the report shall be deemed to be confirmed on the expiration of fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of the report is served within that time.

Comments

56.06 (3)

- Working Group. Williston 56.06 and 56.07 speak in terms of "appealing from" a report on a reference (as do present rules 512-3 and J.A.s.75). This language is confusing and more importantly raises potential problems with s.96 of the B.N.A. Act. A report on a reference is not binding on parties until it is confirmed. And it seems rather odd to talk about appealing something which is not yet binding on the parties. However the constitutional point is the more important consideration. Referees are not s.96 judges and because of this they generally may not decide the rights of parties. Yet to speak of appealing the report on a reference implies that the report is a decision. We suggest that the problem can be overcome by a change in language. Instead of speaking in terms of appealing a report, the rule should refer to "moving to oppose confirmation".

Williston's Proposed Rules

(2) Where a judgment or order directing a reference does not require the person to whom the reference is directed to report back to the judge directing the reference or to a judge of that court, the report shall be deemed to be confirmed upon the expiration of 15 days after a copy of the report, with proof of service thereof on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced unless a notice of appeal is served within that time.

MOTION TO OPPOSE CONFIRMATION

56.07[(1) Where the whole proceeding has been referred for trial or hearing, a motion to oppose confirmation of the report shall be to the [Divisional Court.]]

56.07

- Working Group. If our suggestion, above, that the language of "moving to oppose confirmation" be used in place of "appealing from a report" is accepted, it should be carried through in 56.07. Our recommendation is this language change be made and that the portions in square brackets be deleted.

56.07(1)

- S. J. Coo questioned Williston 56.07(1) which provided that where the whole proceeding is referred for trial (without any requirements reporting back) the appeal should be to the Divisional Court (and not to the Court of Appeal as it is presently under J.A. s.75). He made the point that whenever a requirement of reporting back is imposed the ultimate decision will be embodied in the judgment of a judge and any resulting appeal would be to the Court of Appeal. He suggested there is no good reason for designating different appeal routes.

  Working Group. In the R.S.O. 1980 the Mechanics' Lien Act provision, now s.47(1), re appeals from reports of the master has been amended to provide that in such cases the appeal is to be to the Divisional Court. This is consistent with the

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56.07 Appeal from Report

(1) Where the whole proceeding has been referred for trial or hearing, an appeal from the report shall be to the Divisional Court.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
	philosophy that all appeals formerly to the Court of Appeal but arising under an Act other than the Judicature Act, the County Courts Act or the Unified Family Courts Act shall be to the Divisional Court. At present, by J.A. s.74 where the whole action has been referred for trial then (except in Mechanics' Lien action) the appeal from the report is directly to the Court of Appeal i.e. Williston 56.07 represents a change in the law.	
(2) [In any other case,] a motion to oppose confirmation of the report shall be to a judge, but the motion shall not be heard by the person who conducted the reference.	We question whether there is any real utility in retaining the separate category of cases where the whole proceeding has been referred for a trial of hearing. How often does this occur except in Mechanics' Lien actions? We recommend that this category be dropped from the rules. The result will be that generally where a party wishes to oppose confirmation he should move to do so before a judge of the court directing the reference: 56.07(2). However, some qualification to this principle is necessary to avoid the situation of the motion to oppose confirmation coming on before the very judge who conducted the reference (as could happen where, in a Supreme Court proceeding, a reference is directed to a local judge and under Rule 37 the motion to oppose would come on before a local judge, or, in a County Court proceeding where the judge directs the reference to himself or another County Court judge).	(2) In every other case where there is a right of appeal from a report, the appeal shall be, (a) to a judge of the High Court, where the proceeding is in the Supreme Court; or (b) where the proceeding is in a county court, to a judge of that court, unless the reference was directed to a judge of that court as local master in which case the appeal shall be to a judge of the High Court.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
(3) A motion to oppose confirmation of a report shall be on notice setting out the grounds for opposing confirmation and shall be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced and naming the first available hearing date, subject to subrule 37.06(6) (time for service of notice of motion).	56.07(3) - Compare Williston 56.07(3) and (5). The provision renaming the first available hearing date picks up part of Williston 56.07(5), using the new formula adopted by the Sub-committee and extends this requirement (as S.J. Coo suggested) to county courts.	(3) An appeal from a report shall be on notice setting out the grounds of appeal, served within 15 days after a copy of the report, with proof of service thereof on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced. (5) Where the appeal is to a judge of the High Court it shall be made returnable within 30 days after the filing of the report and the provisions of Rule 63.02 shall apply as if the appeal was from an interlocutory judgment or order.
(4) [Where the motion is to the Divisional Court, subject to subrule (3), Rule 62 applies with necessary modifications as if the motion were an appeal from a judgment.]	56.07(4) - If the recommendation made above is accepted this provision would be deleted.	(4) Except as provided in paragraph (3), where the appeal is to the Divisional Court, the applicable provisions of Rule 62 shall apply as if the appeal was from a judgment.

REVISED RULES OF CIVIL PROCEDURE

RULE 57 PROCEDURE ON A REFERENCE

General Provisions for Conduct of Reference

57.01(1) A person to whom a reference has been directed shall, subject to any directions contained in the order of reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,

(a) give such directions as are necessary; and

(b) dispense with any procedure ordinarily taken that he considers to be unnecessary or adopt a procedure different from that ordinarily taken.

(2) A person conducting a reference shall report on any special circumstances relating to the reference and shall generally inquire into, decide and report on all matters relating to the reference as fully as if they had been specifically referred to him.

(3) Subject to subrule (1), a reference shall be conducted, as nearly as may be, in accordance with rules 57.02 to 57.07 and for that purpose, a person other than a master who conducts a reference has the same power as a master in the conduct of a reference.

COMMENTS

RULE 57 PROCEDURE ON A REFERENCE

For clarity this rule has been re-organized, some headings changed and numerous subheadings added.

57.01

- Heading expanded, language re-drafted.
- Revised Rule 57.01(1) is Williston 57.01(a) substantially redrafted: the language "shall devise and adopt the simplest" (in present R. 425 but omitted from Williston) has been reinserted.
- There appeared to be a conflict between Williston 57.01(a) and (c) and hence revised rule 57.01(3) has been made subject to 57.01(1). Is this appropriate?

WILLISTON'S PROPOSED RULES

57.01

RULE 57 PROCEDURE ON A REFERENCE

57.01 Conduct of Reference

Any person to whom a reference has been directed shall,

(a) subject to any directions contained in the judgment or order of reference, conduct the reference in the least expensive and most expeditious manner and, to that end, he shall give such directions as may seem necessary and he may dispense with any proceeding ordinarily taken which he considers to be unnecessary or adopt a procedure different from that ordinarily taken;

(b) report any special circumstances and shall generally inquire into, decide and report on all matters relating thereto, as fully as if they had been specifically referred to him; and

(c) conduct the reference, as nearly as may be, in accordance with the practice and procedure on a reference before a master, and for that purpose, he shall have the same power and authority as a master.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.02
Procedure on a Reference Generally	57.02	
Directions Hearing	- Heading revised.	
57.02(1) The party having carriage of the reference shall forthwith take out the order of reference and, within ten days thereafter, request an appointment with the master for a hearing to consider directions for the reference and, in default, any other party having an interest in the reference may assume carriage of the reference.	57.02(1) - Subheading added. The term "hearing to consider directions for the reference" has been adopted (after discussion with Master Dunn) to describe this hearing.	57.02 Practice and Procedure on a Reference before a Master (1) The party having carriage of the reference shall forthwith proceed to take out the judgment or order of reference and, within 10 days thereafter, apply to the master for an appointment to consider the reference and, in default thereof, any other party having an interest in the reference may assume carriage of the reference.
(2) A notice of direction hearing (Form 57A) and a copy of the order of reference shall be served on every other party to the action at least five days before the hearing unless otherwise directed by a master or provided by these rules.	57.02(2) - Williston 57.02(4), L.R. and form added	(4) Unless otherwise directed by a master or required by these rules, at least 5 days notice of the reference, together with a copy of the judgment or order of reference, shall be served upon every other party to the action.
Directions		
(3) At the directions hearing, the master shall give such directions for the conduct of the reference as are just, including, (a) the time and place at which the reference is to proceed; (b) any special directions as to the parties who are to attend; and (c) any special directions as to what evidence is to be received and how documents are to be proved.	57.02(3) - Williston 57.02(2), subheading added and L.R.	(2) On the return of the appointment, the master shall give such directions for the conduct of the reference as may seem just including, (a) the time and place at which the reference is to proceed; (b) any special directions as to the parties who are to attend; and (c) any special directions as to how the evidence is to be received.
(4) Any such directions may be varied or supplemented during the course of the reference.	57.02(4) - Willistion 57.02(3), L.R.	(3) Any such directions may be varied or supplemented during the course of the reference as to the master may seem just.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.02
Adding Parties (5) Where it appears to the master that any person ought to be added as a party to the action, the master may make an order adding him as a defendant and direct that a copy of the order, together with a copy of the order of reference and a notice to party added on reference (Form 57B) be served on the person, and the person becomes a party to the action on being served and shall be bound as if he had been an original party.	57.02(5) - Subheading added, L.R. and form renumbered. In response to S.J. Coo's comments it has been made clear that the person becomes a party from the time he has served.	(5) Where it appears to the master that any person ought to be added as a party to the action, the master may make an order adding him as a party defendant and direct that a copy of such order, together with a copy of the judgment or order of reference and a Notice to an Added Party (Form 57A) be served on such person, who thereupon shall be treated and named as a party to the action and shall be bound as if he had been an original party thereto.
(6) A person so served may move before a judge at any time within ten days after service to vary or set aside the order of reference or the order adding him as a party.	57.02(6) - L.R.	(6) A person so served may apply to a judge at any time within 10 days from the date of such service to discharge, add to, vary or set aside the judgment or order of reference or the order adding him as a party.
Representation of Parties with Similar Interests (7) Where it appears to the master that two or more parties have substantially similar interests, he may require them to be represented by the same solicitor and, where they cannot agree on a solicitor to represent them, the master may designate a solicitor on such terms as are just.	57.02(7) - Williston 57.02(8), subheading added and L.R.	(8) Where it appears to the master that two or more parties have substantially similar interests, he may require such parties to be represented by the same solicitor; and, where those parties cannot agree upon the choice of a solicitor to represent them, the master may designate a solicitor for that purpose upon such terms as may seem just.
Amendment of Pleadings (8) The master may grant leave to make any necessary amendments to the pleadings that are not inconsistent with the order of reference.	57.02(8) - Williston 57.02(7), subheading added, L.R.	(7) The master may grant leave to make any necessary amendments to the pleadings which are not inconsistent with the judgment or order of reference as may seem just.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.02
Procedure Book (9) The master shall keep in his office a procedure book in which he shall note all steps taken before him and all directions given by him in respect of the reference, and the directions need not be embodied in a formal order to bind the parties.	57.02(9) - Subheading added, L.R.	(9) The master shall keep in his office a Procedure Book in which he shall note all proceedings taken before him and all directions given by him in respect of the reference, and such directions need not be embodied in a formal order to bind the parties attending on the reference.
Adjournments (10) Where a reference cannot be completed in one day, it shall be adjourned to the following day, if possible, but where this is not possible, the master shall note the adjournment in his procedure book, together with the reason for the adjournment and shall, if possible, fix the time when the reference is to be resumed.	57.02(10) - Subheading added, L.R.	(10) Where a reference cannot be completed in one day, it shall be adjourned to the following day, if possible. Where this is not possible, the master shall note the adjournment in his Procedure Book, together with the reason therefor and shall, if possible, fix the time when it is to be resumed.
Transferring Carriage of Reference (11) Where the party having carriage of the reference does not proceed with reasonable diligence, the master may, on the motion of any other interested party, transfer to him the carriage of the reference.	57.02(11) - Subheading added.	(11) Where the party having carriage of the reference does not proceed with reasonable diligence, the master may, upon the motion of any other interested party, transfer to him the carriage of the reference.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.02
Evidence of Witnesses (12) Witnesses on a reference shall be examined orally unless the master directs otherwise.	57.02(12) - New in response to S.J. Coo's point that there is no equivalent in the Williston proposals re references of present J.A. section 76 and Rule 269. Should the words "and their evidence recorded" be added after "examined orally"? Present section 76 and case law requires evidence on a reference to be recorded. The revised rules have no provision specifically requiring recording of evidence at trial, but has such provisions for out of court examination e.g. Rule 33.17.	
Examination of Party and Production of Documents (13) The master may require any party to be examined and to produce such documents as he thinks fit and may given directions for their inspection by any other party.	57.02(13) - Williston 57.02(12), subheading added.	(12) The master may require any party to be examined and to produce such documents as he thinks fit and may give directions for their inspection by any other party.
Filing of Documents (14) While a reference is pending before the master, all documents relating to it shall be filed with the master and, on completion of the reference, the documents shall be sent to the office in which the action was commenced for filing in the court file.	57.02(14) - Williston 57.02(19), subheading added, L.R.	(19) While a reference is pending before the master, all documents relating thereto shall be filed with the master and, upon completion of the reference, such documents shall be sent to the office in which the action was commenced for filing in the court file.

Revised Rules of Civil Procedure

Execution or Delivery of Instrument

(15) Where a person refuses or neglects to execute or deliver an instrument as directed by an order of reference, the master may give directions as to its execution or delivery.

Directions from Judge

(16) On request by a party in writing or where he considers it necessary, the master may request directions from a judge on any matter arising on the reference.

Rulings

(17) Where the master has made a ruling with respect to the admissibility of evidence or any other matter relating to the conduct of the reference he shall, on the request of any party, set out in his report his ruling and his reasons.

(18) A ruling made by the master on a reference is not subject to appeal during the course of the reference, except by leave of the master, and where leave is granted, the master shall set out his ruling in an interim report.

Comments

57.02(15)

- Williston 57.05, heading change and L.R.

- Present R. 419 is somewhat broader in that it extends to the execution of an instrument which "becomes necessary" on the reference. Should 57.02(15) be broadened?

57.02(16)

- New. Inserted at the suggestion of Messrs. Mayer and Robertson who particularly wanted to see such a specific power re receivership references.

57.02(17)

- Williston 57.02(15), subheading added, L.R.

57.02(18)

- Williston 57.02(16).

Williston's Proposed Rules

57.02

57.05 Execution or Delivery of Deed or Conveyance

Where any person refuses or neglects to execute or deliver any deed or conveyance as directed by any judgment or order of reference, the master may give direction as to the execution or delivery thereof.

57.02(15) Where the master has made a ruling with respect to the admissibility of evidence or otherwise during the course of the reference he shall, on the request of any party, set out in his report his ruling and the reasons therefor.

(16) Any ruling made by the master on a reference shall not be subject to appeal during the course of the reference, except by leave of the master. Where such leave is granted, the master shall set out his ruling in an interim report.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES 57.02
Preparation of Report (19) When the hearing of the reference is completed, the master shall fix a day to settle his report and notice thereof shall be served upon all parties who have appeared on the reference unless notice is dispensed with.	57.02(19) - Williston 57.02(13), subheading added.	(13) When the hearing of the reference is completed, the master shall fix a day to settle his report and notice thereof shall be served upon all parties who have appeared upon the reference unless such notice is dispensed with.
(20) The party having carriage of the reference shall prepare a draft report and present it to the master to settle on the day fixed for settling the report.	57.02(20) - Williston 57.02(17), L.R.	(17) The party having carriage of the reference shall prepare a draft report and present it to the master to settle on the day fixed therefor.
(21) When the report is settled and signed by the master, the party having carriage of the reference shall forthwith serve a copy on all parties appearing on the reference and file a copy with proof of service.	57.02(21) - Williston 57.02(18), L.R.	(18) When the report is settled and signed by the master, the party having carriage of the reference shall forthwith serve a copy thereof on all parties appearing on the reference and file a copy thereof with proof of such service.
(22) In a proceeding for the administration of the estate of a deceased person, the report shall, as far as possible, be in Form 57C.	57.02(22) - Williston 57.02(14). Form renumbered.	(14) In a proceeding for the administration of the estate of a deceased person, the report shall, as far as possible, be according to Form 57B.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.03
Procedure to Ascertain Interested Persons	57.03 - Williston 57.04, new heading. - Since this rule really is concerned with a matter which can arise on various types of references (rather than the procedure on a particular type of reference, cf. 57.04 and 57.06) should it be incorporated into 57.02 Procedure on a Reference Generally?	57.04 Making of Inquiries
57.03(1) The master may direct the publication of advertisements for creditors or beneficiaries on an estate or trust, or other unascertained persons, or their successors.	57.03(1) - Williston 57.04(1), L.R.	(1) The master may cause advertisements for creditors or for heirs or next-of-kin, or other unascertained persons, and for the representatives of such as are deceased, to be published.
(2) The advertisement shall specify a date and place for filing the claims of any such persons and shall notify them that, unless their claims are so filed, they will be excluded from the benefit of the order [but a claim may nevertheless be accepted by the master at a later time].	57.03(2) - Williston 57.04(2), L.R. - S.J. Coo pointed out that Williston was narrower than the present R. 415. Should the bracketed words be added to broaden the rule and make it similar to R. 415?	(2) In any such advertisement, the master shall appoint a time and place for filing the claims of any such persons and the advertisement shall notify them that, unless their claims are so filed, they will be excluded from the benefit of the order.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		57.03
(3) Before the day specified by the master to consider the claims filed pursuant to any such advertisement, the executor, administrator or trustee, or such other person as the master directs, shall examine the claims and file an affidavit verifying a list of the claims sent in pursuant to the advertisement and stating which of them he believes should be disallowed and the reasons for his belief.	57.03(3) - Williston 57.04(3), L.R. - S.J. Coo make the following comment in respect of this provision (is a change necessary): Paragraph (3) in effect seems to reverse the obligation to be cast upon the executor, administrator or trustee. Under the new Rule he will have an obligation to state which of the claims he believes should be disallowed. The present Rule 417 obliges him to comment upon "which of them are just and proper". Presumably the new approach is easier and more expeditious but perhaps should be examined.	(3) Before the day appointed by the master to consider the claims filed pursuant to any such advertisement, the executor, administrator or trustee, or such other person as the master directs, shall examine such claims and file an affidavit verifying a list of the claims sent in pursuant to the advertisement and stating which of them he believes should be disallowed and the reasons for such belief.
(4) If any claim is contested, the master shall require service on the claimant of a notice of contested claim (Form 57D) fixing a day for adjudication on the claim.	57.03(4) - Williston 57.04(4), L.R., form renumbered.	(4) If any claim is contested, the master shall require Notice of Contestation (Form 57C) to be served upon the claimant fixing a day for adjudication upon the claim.

REVISED RULES OF CIVIL PROCEDURE

Procedure on Taking of Accounts

57.04(1) On the taking of accounts, the master may,

(a) take the accounts with rests or otherwise;

(b) take account of money received or which, but for wilful neglect or default, might have been received;

(c) make allowance for occupation rent, and determine the amount thereof;

(d) take into account necessary repairs, lasting improvements, costs and other expenses properly incurred; and

(d) make all just allowances.

(2) Where an account is to be taken, the party required to account, unless the master directs otherwise, shall prepare the account in debit and credit form, verified by affidavit.

(3) The items on each side of the account shall be numbered consecutively, and the account shall be referred to in the affidavit as an exhibit and shall not be attached to it.

COMMENTS

57.04

- Williston 57.03, heading change.

- Working Group. Is this rule really necessary at all unless the money is already in court? If it applies only where money is in court, should it be specifically so limited?

57.04(1)

- Williston 57.03(1). Clause (a) has been inserted and all other clauses renumbered. Clause (a) is the present R. 413(a) and was reinserted at the suggestion of S.J. Coo.

57.04(2) and (3)

- Williston 57.03(2) subruled, L.R.

WILLISTON'S PROPOSED RULES

57.04

57.03 Taking of Accounts

(1) On the taking of accounts, the master may,

(a) take account of money, rents and profits received or which, but for wilful neglect or default, might have been received;

(b) make allowance for occupation rent, and determine the amount thereof;

(c) take into account necessary repairs, lasting improvements, costs and other expenses properly incurred; and

(d) make all just allowances.

(2) Where an account is to be taken, the accounting party, unless the master otherwise directs, shall prepare the account in debit and credit form, verified by affidavit, and the items on each side of the account shall be numbered consecutively, and the account shall be referred to in the affidavit as an exhibit and shall not be annexed thereto.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.04
(4) The master may direct that the books in which the accounts have been kept be taken as prima facie proof of the matters contained in them.	57.04(4) - Williston 57.03(3) L.R.	(3) The master may direct that the books of account in which the amounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained.
(5) Before hearing a reference, the master may name a day for the purpose of taking the accounts and may direct the production and inspection of vouchers and, if deemed proper, cross-examination of the party required to account on his affidavit with a view to ascertaining what is admitted and what is contested between the parties.	57.04(5) - Williston 57.03(4).	(4) Before proceeding to the hearing of a reference, the master may appoint a day for the purpose of taking the accounts and may direct the production and inspection of vouchers and, if deemed proper, cross-examination of the accounting party on his affidavit with a view to ascertaining what is admitted and what is contested between the parties.
(6) Where a party questions an account he shall give to the party required to account particulars of his objection with specific reference to the item in question by number, and the master may require him to give further particulars of the objection.	57.04(6) - Williston 57.03(5).	(5) Where any party questions an account he shall give to the accounting party particulars of his objection thereto with specific reference to the item in question by number, and the master may require him to give further particulars of any such objection.
Direction for Payment of Money 57.05(1) Where under an order of reference the master directs money to be paid at a specified time and place, he shall direct it to be paid into a financial institution to the credit of the party entitled or to the joint credit of the party entitled and the Accountant.	57.05 - References to "banks" have been changed to "financial institutions" so that trust companies and other institutions will be included.	57.06 Direction for Payment of Money (1) Where pursuant to any judgment or order of reference the master directs any money to be paid at any specified time and place, he shall direct it to be paid into a bank to the credit of the party to whom it is made payable or to the joint credit of the party to whom it is made payable and the Accountant.
(2) Where money is directed to be paid to the credit of the party he may name the financial institution into which he desires it to be paid and it may be paid out without an order.		(2) Where money is directed to be paid to the credit of the party to whom it is made payable, he may name the bank into which he desires it to be paid and it may be paid out without an order.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.05
(3) Where money is paid to the joint credit of the party and the Accountant, the Accountant shall sign the cheque for payment out on the production of the consent of the party paying in, verified by affidavit, or of his solicitor, or in the absence of the consent, on the order of the master.		(3) Where money is paid to the joint credit of the party and the Accountant, the Accountant shall sign the cheque for payment out upon the production of the consent of the party paying in, duly verified by affidavit, or by his solicitor, or in the absence of such consent, upon the order of the master.
(4) Where it appears that money in court belongs to a minor, the master shall require evidence of the age of the minor and shall, in his report, state the date of birth of the minor [or shall set out his reasons for not stating the date of birth].	57.05(4) - The bracketed words are in present R. 434 but were omitted in Williston.	(4) Where it appears that any money in court belongs to a minor, the master shall require evidence of the age of the minor and shall, in his report, state the date of birth of any such minor.
(5) Where an order of reference or a report directs the payment of money out of court to creditors, the person having carriage of the reference shall deposit with the Accountant a copy of the order or report and shall serve a notice to creditor (Form 57E) on each creditor stating that payment of his claim, as allowed, may be obtained from the Accountant.		(5) Where any judgment or order of reference or any report directs the payment of money out of court to creditors, the person having carriage of the reference shall deposit with the Accountant a copy of such judgment, order or report, and shall give a Notice (Form 57D) to each creditor that payment of his claim, as allowed, may be obtained from the Accountant.

REVISED RULES OF CIVIL PROCEDURE

Reference for Conduct of Sale

Method of Sale

57.06(1) Where a sale is ordered, the master may cause the property to be sold by public auction, private contract or tender, or part by one mode and part by another.

Advertisement

(2) Where a property is directed to be sold by auction or tender, the party having carriage of the sale shall prepare a draft advertisement pursuant to the instructions of the master showing,

(a) the short title of the proceeding;

(b) that the sale is by order of the court;

(c) the time and place of the sale;

(d) a short description of the property to be sold;

(e) whether the property is to be sold in one lot or several and, if in several, in how many, and in what lots;

(f) the terms of payment;

(g) that the sale is subject to a reserve bid, if that is the case; and

(h) any conditions of sale different from those set out in Form 57F.

COMMENTS

57.06

- Williston 57.07, heading rewritten.

57.06(1)

- Williston 57.07(1), subheading added, L.R.

57.06(2)

- Williston 57.07(2), subheading added, L.R.

- Working Group. Surely the requirement that the advertisement indicatesthat it is a sale by order of the court (clauses (a) and (b)) ensure that a lower price will be realized. Could they usefully be deleted?

WILLISTON'S PROPOSED RULES

57.06

57.07 Conduct of Sale

(1) Where a sale is ordered, the master may cause the property to be sold either by public auction, private contract or tender, or part by one mode and part by another, as may seem just.

(2) Where a property is directed to be sold by auction or by tender, the party having the conduct of the sale shall prepare a draft advertisement pursuant to the instructions of the master showing,

(a) the short style of cause;

(b) that the sale is pursuant to a judgment or order of the court;

(c) the time and place of the sale;

(d) a short description of the property to be sold;

(e) the manner in which the property is to be sold, whether in one lot or several and, if in several, in how many, and in what lots;

(f) what proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such money is to be paid with or without interest;

(g) that the sale is subject to a reserve bid, if such is the case; and

(h) the proposed conditions of sale.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.06
Conditions of Sale (3) The conditions of sale by auction or tender shall be those set out in Form 57E, subject to such modifications as the master directs.	57.06(3) - Williston 57.07(3), subheading added, L.R. form number changed.	(3) The proposed conditions of sale shall be those set forth in Form 57E, subject to such modification as to the master may seem just.
Directions Hearing (4) At the directions hearing under subrule 57.02(3), the master shall (a) settle the advertisement; (b) fix the time and place of sale; (c) name an auctioneer, where one is to be employed; (d) give directions for publication of the adverstisement; (e) give directions for the obtaining of appraisals; (f) fix a reserve bid, if any; and (g) make all other arrangements necessary for the sale.	57.06(4) - Williston 57.07(4), subheading added, L.R.	(4) Upon the return of the appointment to give directions for the sale, the master shall settle the advertisement, fix the time and place of sale, name an auctioneer, where one is to be employed, give directions for publication of the advertisement and for the obtaining of appraisals, fix a reserve bid, if any, and make all other necessary arrangements for the sale.
Who May Bid (5) All parties may bid except the party having carriage of the sale and any trustee or agent [or other person in a fiduciary position to] him.	57.06(5) and (6) - Williston 57.07(5), subruled, subheading added, L.R. - Re the bracketed words in (5): S.J. Coo points out that at present R. 445 except "any trustees agents or other person in a fudiciary position" and Williston added "to him". Working Group: How should this be resolved? Surely R. 445 is too broad?	(5) All parties may bid except the party having the conduct of the sale and any trustee, agent or other person in a fiduciary position to him. Where the party having the conduct of the sale wishes to bid, the master may transfer the conduct of the sale to another party or to any other person appointed by him.
(6) Where the party having carriage of the sale wishes to bid, the master may transfer carriage of the sale to another party or to any other person appointed by him.		

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES 57.06
Who Conducts Sale (7) Where no auctioneer is employed, the master or a person designated by him shall conduct the sale.	57.06(7) - Williston 57.07(6), subheading added, L.R.	(6) Where no auctioneer is employed, the master or his clerk shall conduct the sale.
Deposit (8) The deposit required by the conditions of sale shall be paid into court at the time of sale in the name of the purchaser.	57.06(8) - Williston 57.07(7) subheading added, L.R.	(7) The deposit required by the conditions of sale shall be paid to the party having the conduct of the sale or his solicitor at the time of sale and shall forthwith be paid by him into court in the name of the purchaser.
Interim Report (9) Where a sale is made through an auctioneer, the auctioneer shall make an affidavit as to the result of the sale, and where no auctioneer is employed, the master shall enter the result in his procedure book and, in either case, the master may make an interim report on the sale (Form 57F).	57.06(9) - Williston 57.07(8), subheading added, L.R., form renumbered.	(8) Where a contract of sale is made through an auctioneer, the auctioneer shall make an affidavit as to the result of the sale. Where no auctioneer is employed, the master shall enter the result in his Procedure Book and, in either case, the master may make an interim report on the sale (Form 57F).
Objections to Sale (10) Objection to the sale shall be by motion to oppose confirmation of the report on the sale and notice of the motion shall be served on all parties to the reference and on the purchaser, who shall be deemed to be a party for the purpose of the motion.	57.06(10) - Williston 57.06(9), subheading added, L.R. - "Appeal" changed to "motion to oppose confirmation" cf. revised Rule 56.07. - S.J. Coo pointed at that in light of the wording of subrule (9) is not clear that there will inevitably be a report. Would it help to add before "report" the words "interim or final"?	(9) Objection to the sale shall be by way of appeal from the report on the sale and notice of the appeal shall be served upon all parties to the reference and upon the purchaser who shall be deemed to be a party for the purpose of any such appeal.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		57.06
Completion of Sale (11) The purchaser may pay his purchase money or the balance thereof into court without order and, after the confirmation of the report on the sale, on notice to the party having carriage of the sale, he may, if he desires, obtain a vesting order. (12) Where possession is wrongfully withheld from the purchaser, either the purchaser or the party having carriage of the sale may move for a writ of possession. (13) The purchase money may be paid out of court, (a) on consent of the purchaser or his solicitor; or (b) on proof to the Accountant that the purchaser has received a conveyance or vesting order of the property for which the money in question was paid into court. (14) No conveyance shall be approved until evidence is produced that the purcahse money has been paid into court and, where a mortgage is taken for part of the purchase money, until evidence is given to the master that the mortgage has been registered and deposited with the Accountant.	57.06(11) and (12) - Williston 57.06(10), subruled, subheading added, L.R. 57.06(13) - Williston 57.06(11), L.R. 57.06(14) - Williston 57.06(12), L.R.	(10) The purchaser may pay his purchase money or the balance thereof into court without order, and, after the expiration of the time for appeal from the report on the sale, upon notice to the party having the conduct of the sale, he may, if he so desires, obtain a vesting order. Where possession is wrongfully withheld from the purchaser, either the purchaser or the party having the conduct of the sale may apply for an order against any party in possession. (11) The purchase money shall not be paid out of court except upon consent of the purchaser or his solicitor or upon proof to the Accountant that the purchaser has received a conveyance or vesting order of the property for which the money in question was paid into court. (12) No conveyance shall be settled until evidence is produced of the purchase money having been paid into court and, where a mortgage is taken for part of the purchase money, until evidence is given to the master of such mortgage having been registered and deposited with the Accountant.

Revised Rules of Civil Procedure

Reference to Appoint Committee, Guardian or Receiver

57.07(1) Where, by an order of reference, a master is directed to appoint a committee, guardian or receiver, the master shall not report on the appointment until he has settled and approved any security required by the order and until the security has been filed with the Accountant.

(2) Where, by an order of reference or report, the person so appointed is required to pass his accounts or to pay money into court and has not done so, the master may, on the passing of accounts, disallow any compensation and may charge the person with interest.

Comments

57.07

- Williston 57.08, heading changed and L.R.

Williston's Proposed Rules

57.07

57.08 Appointment of Committee, Guardian or Receiver

(1) Where, by any judgment or order of reference, a master is directed to appoint a committee, guardian or receiver, the master shall not report on such appointment until he has settled and approved any security required by the judgment or order and until such security has been duly filed with the Accountant.

(2) Where, by any judgment or order of reference or report, the person so appointed is required to pass his accounts or to pay his balances into court, and is in default of compliance with such direction, the master may, on the passing of accounts, disallow any compensation and may charge such person with interest on his balances.

REVISED RULES OF CIVIL PROCEDURE

RULE 58 SECURITY FOR COSTS

Where Available

58.01 In an action a plaintiff may be ordered to give security for costs where it appears that,

(a) he is ordinarily resident outside Ontario;

(b) the defendant has a judgment or order against the plaintiff for costs in another action, and those costs remain unpaid in whole or in part;

(c) he is a nominal plaintiff, and there is good reason to believe that he has insufficient assets in Ontario to pay the costs of the defendant if ordered to do so;

(d) it is a corporation, and there is good reason to believe that it has insufficient assets in Ontario to pay the costs of the defendant if ordered to do so; or

(e) the defendant is entitled by statute to security for costs.

COMMENTS

RULE 58 SECURITY FOR COSTS

General Comments (Working Group)

- As presently drafted this rule applies only to actions. Should it also apply to applications?

- Should this rule apply to a defendant or third party who counterclaims or cross-claims? Does it as presently drafted? Is a "boiler plate" provision similar to Williston 28.10, 29.10, etc. necessary?

58.01

- L.R.

- S. J. Coo expressed concern about one of several defendants applying for security without giving notice to his co-defendants. Apparently he has a right to do so today (Five Star v. Merton [1968] O.W.N. 683) and this would seem to be the situation under the new rules: 37.06(1), since the co-defendant would not be a party affected by the order sought. Does this require a change?

WILLISTON'S PROPOSED RULES

58.01

RULE 58 SECURITY FOR COSTS

58.01 Where Available

In any action a plaintiff may be ordered to furnish security for costs where it appears that,

(a) he is ordinarily resident out of Ontario;

(b) the defendant has a judgment or order against the plaintiff for costs in another action, and those costs remain unpaid in whole or in part;

(c) his is a nominal plaintiff, and there is good reason to believe that he has not sufficient assets in Ontario to pay the costs of the defendant if ordered to do so;

(d) it is a corporation, and there is good reason to believe that it has not sufficient assets in Ontario to pay the costs of the defendant if ordered to do so; or

(e) the defendant is entitled by any statute to security for costs.

Revised Rules of Civil Procedure

Time for Making Motion

58.02 A motion for security for costs may be made at any time after the defendant has delivered his statement of defence and before the action is placed on the list for trial.

Amount and Form of Security and Time for Furnishing

58.03 The amount and form of security and the time for paying into court or otherwise furnishing the required security shall be determined by the court.

Form and Effect of Order

58.04 An order for security for costs (Form 58A) stays all steps in the action from the date the order is served until the security has been given, unless otherwise provided.

Default of Plaintiff

58.05 Where a plaintiff defaults in furnishing the security required by an order, the court on motion of the defendant who obtained the order may dismiss the action.

Comments

58.02

- L.R.
- Is it necessary to specifically require that the application be brought before the action is placed on the list for trial?

58.03

- no change

58.04

- L.R.

58.05

- L.R.
- At the suggestion of S. J. Coo the reference to "with or without costs" has been deleted in light of the broad discretion as to costs provided in Rule 59.

Williston's Proposed Rules

58.02

58.02 Time for Making Motion
A motion for security for costs may be made to the court at any time after the defendant has delivered his Statement of Defence and before the action is placed on the list for trial.

58.03 Amount and Form of Security and Time for Furnishing
The amount and form of the security and the time for paying into court or otherwise furnishing the required security shall be determined by the court.

58.04 Form and Effect of Order
An Order for Security for Costs (Form 58A) shall have the effect of staying all proceedings in the action from the date the order is served until the amount of security required has been furnished, unless otherwise provided.

58.05 Default of Plaintiff
Where a plaintiff defaults in furnishing the security required by such an order, the defendant who obtained the order may apply for an order dismissing the action with or without costs, as may seem just.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		58.06
Amount May Be Varied 58.06 The amount of security required by an order for security for costs may be increased or decreased at any time.	58.06 - L.R.	58.06 **Amount May Be Varied** The amount of security required by an order for security for costs may be increased or decreased by the court at any time and from time to time.
Notice of Compliance 58.07 On furnishing the security required by an order, the plaintiff shall forthwith give notice of his compliance to the defendant who obtained the order and to every other party.	58.07 - L.R.	58.07 **Notice of Compliance** Upon furnishing the security required by such an order, the plaintiff shall forthwith give notice of his compliance to the defendant who obtained the order and to every other party.
Payment Out 58.08(1) Money paid into court as security for costs may be paid out on the consent of the solicitors for the parties concerned without order, and may be paid to the solicitor for either party upon production of the consent of his client verified by affidavit. (2) Where the money has been paid into court by or on behalf of an insurer of a party, the consent of the client may be given by the insurer.	58.08 - Williston 58.08 has been sub-ruled and L.R. - S. J. Coo queried whether the consent of the client verified by affidavit was really necessary to permit the money to be paid out to a solicitor. He suggested that a consent to payment out executed on behalf of the parties by their solicitors should be sufficient. Working Group: 58.01(1) is identical to present R.382, but note present R. 738 which would appear to be inconsistent at least in certain circumstances. Does the Sub-committee agree that the clients consent to payment out need not be obtained if the solicitor files an affidavit that he is entitled to the costs?	58.08 **Payment Out** Any monies paid into court as security for costs may be paid out on the consent of the solicitors for the parties concerned without order, and may be paid to the solicitor for either party upon production of the consent of his client verified by affidavit. Where the money has been paid into court by or on behalf of an insurer of one or more of the parties, the consent of the client may be given by such insurer.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		58.09
Security for Costs as Term of Relief 58.09 Notwithstanding the provisions of rules 58.01 to 58.08, any party to a proceeding may be ordered to furnish security for costs where, by these rules or otherwise, the court has a discretion to impose terms as a condition of granting him relief.	58.09 - Heading change and L.R.	58.09 Effect of Rule Notwithstanding the provisions of this rule, any party to a proceeding may be ordered to furnish security for costs where, by these rules or otherwise, the court has a discretion to impose terms as a condition of granting him relief.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		59.01
RULE 59 COSTS OF PROCEEDINGS BETWEEN PARTY AND PARTY	RULE 59 COSTS OF PROCEEDING BETWEEN PARTY AND PARTY General Comments (1) Williston Rule 59 is very long, running 10 pages. Essentially the rule deals with two subjects - (a) entitlement to, or the awarding of, costs and (b) the taxation (assessment) of costs. It seems sensible to divide Rule 59 into two rules, one dealing with each of these subjects. Inter Alia, this will meet W.C. McBride's criticism that in its present form sub-rule 59.08 Taxation of Costs is too long and difficult to cite. (2) In the revised rule, following the lead of New Brunswick, the term "assessment" has been substituted for "taxation". In modern English usage of the term "taxation" seems quite inappropriate and it is understandable only to lawyers and only through long usage.	COSTS RULE 59 COSTS OF PROCEEDINGS BETWEEN PARTY AND PARTY

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
	59.01	59.01
	- In an attempt to make the effect of the provisions clearer, Williston 59.01 and 59.02 have been reorganized and placed in one rule.	
General Principles as to Costs 59.01(1) In exercising its discretion under section 64 of the Judicature Act in making an order as to costs, the court may consider, (a) the amount claimed and the amount recovered; (b) the apportionment of liability; (c) the complexity of the proceeding; (d) the importance of the issues; (e) the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding; (f) the manner in which the proceeding was conducted; (g) any step in the proceeding that was improper, vexatious or unnecessary; (cont'd)	59.01(1) - Williston 59.02(1), L.R. - In line with the approach adopted in other rules which deal with subjects that are also dealt with in the Judicature Act, a "reminding" cross-reference to s.64 has been included here. - This list of factors to be considered makes no explicit reference to success or failure in the proceeding (but note 59.01(1)(a)) Should it? (N.B. if this reference is to be made explicit, consider the cross-reference in 59.02). - 59.01(g) W. C. McBride suggested deletion of "prolix" as a step in the proceeding cannot be so described.	**59.02 Costs of a Proceeding** (1) In making any order as to costs, the court or a judge may have regard to, (a) the amount claimed and the amount recovered; (b) the apportionment of liability; (c) the complexity of the proceeding; (d) the importance of the issues; (e) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding; (f) the manner in which the proceeding was conducted; (g) any step in the proceeding that was improper, vexatious, prolix or unnecessary; (cont'd)

(h) any step in the proceeding that was taken through over-caution, negligence or mistake;

(i) the neglect or refusal of any party to make an admission that should have been made [or to make use of a notice to admit under rule 51.02];

(j) whether two or more defendants or respondents should be allowed more than one set of costs where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence; and

(k) whether two or more plaintiffs represented by the same solicitor initiated separate proceedings unnecessarily;

(l) any other matter relevant in the proceeding to the question of costs.

- 59.01(1)(i): S. J. Coo suggests that the bracketed words be added. Is this wise? See column 2 discussion under Rule 51.04.

- 59.01(k): New. Borrowed from New Brunswick. Should it be included?

- 59.01(1)(1): "in the proceeding" added at the suggestion of S. J. Coo.

(h) any step in the proceeding that was taken through over-caution, negligence or mistake;

(i) the neglect or refusal of any party to make an admission that should have been made;

(j) whether or not two or more defendants or respondents should be allowed more than one set of costs where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence; and

(k) any other matter relevant to the question of costs.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		59.01
(2) In making an order as to costs, the court may fix the costs with or without reference to the Tariffs, instead of referring them for assessment, and where the costs are not fixed, they shall be assesed under Rule 60.	59.01(2) - cf. Williston 59.01(a). This provision really makes explicit what was implicit in the Williston rule.	59.01 **Authority of the Court** Nothing in this rule shall be construed so as to interfere with the authority of the court or a judge, (a) to fix the costs of any proceeding, or any step therein, with or without reference to any tariff, instead of referring them for taxation;
(3) Nothing in subrule (1) or (2) or rules 59.02 to 59.10 interferes with the authority of the court under section 64 of the Judicature Act, (a) allow or refuse costs in respect of some particular issue or part of a proceeding; (b) allow a percentage of assessed costs or allow assessed costs up to or from a particular stage of a proceeding; or (c) order costs on a solicitor and client basis.	59.01(3) - cf. Williston 59.01(b) - (d), L.R. - The cross-reference to J.A. s.64 seems necessary to clarify the source of the words "authority" (a question which was raised by S. J. Coo).	(b) to allow or refuse costs in respect of some particular issue or part of a proceeding; (c) to allow a percentage of taxed costs or allow taxed costs up to or from a particular stage of a proceeding; or (d) to order costs on a solicitor and client basis.

59.02

Discretion of Assessment Officer

59.02 Where costs are to be assessed, the court may give directions to the assessment officer in respect of any matter referred to in subrule 59.01(1) and, subject to or in the absence of any such direction, the assessment officer shall exercise his discretion in respect of any of those matters.

59.02

- Williston 59.02(2), heading added, L.R.

(2) In awarding costs to be taxed, the court or a judge may give directions to the taxing officer in respect of any one or more of the matters referred to in paragraph (1); and, subject to such direction or in the absence of any such direction, the taxing officer shall exercise his discretion in respect of any of those matters that may appear to be relevant.

Costs of a Motion

Contested Motion

59.03(1) Where, on the hearing of a contested motion, the court is satisfied that the motion ought not to have been made or opposed, as the case may be, the court shall,

(a) fix the costs of the motion and order them to be paid forthwith; or

(b) order the costs of the motion to be paid forthwith after assessment

59.03(1)

- L.R.

- This rule was drafted by the Williston Committee with a view to changing the existing practice on motions of almost invariably making cost orders which are on the "never-never" ie. will not bite until the litigation is terminated. The rule was picked up by the Rules Committee from an earlier Williston draft and enacted for family law matters as present R.775 1 a (2). Reports are to the effect that this rule is little used and is not working. Is it desirable to "stiffen" 59.03(1) to make the costs of motions generally payable forthwith?

59.03 Costs of a Motion

(1) *Contested Motion*

Where, on the hearing of a contested motion, the court is satisfied that such motion ought not to have been brought or opposed, as the case may be, the court shall fix the costs of the motion and order them to be paid forthwith or order them to be paid forthwith after taxation.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES 59.03
Motion Without Notice (2) On a motion made without notice, there shall be no costs to any party, unless otherwise ordered.	59.03(2) - L.R.	(2) *Motion Without Notice* On a motion made without notice, there shall be no costs thereof to any party, unless otherwise ordered.
Costs on Settlement 59.04 Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not determined by the settlement, on the filing of a copy of the minutes of settlement, the costs may be assessed in accordance with the appropriate tariffs as if an order had been made for assessment of the costs.	59.04 - L.R.	59.04 Costs on Settlement Where a proceeding is settled on the basis that a party thereto shall pay or recover costs, and the amount of such costs is not determined by the settlement, then, upon the filing of a copy of the minutes of settlement, such costs may be taxed in accordance with the appropriate tariffs as if an order had been made for the taxation thereof.
Costs Where Action Brought in Wrong Court 59.05(1) Where in an action in the Supreme Court, a plaintiff recovers an amount within the monetary jurisdiction of a county court or, in an action in the Supreme Court or a county court, he recovers an amount within the monetary jurisdiction of a small claims court, the trial judge may order that the plaintiff shall not recover any costs.	59.05(1) - L.R. - W. C. McBride suggested this rule be deleted as unnecessary, since any trial judge has this jurisdiction, rule or no rule. Working Group: we believe it should stay in (it is presently R. 656) if only to warn practitioners. - The sub-rule has been redrafted so as to avoid use of the phrase "proper competence" which has caused difficulty.	59.05 Where Action Brought in Wrong Court (1) Where an action of the proper competence of a county court is brought in the Supreme Court, or an action of the proper competence of a small claims court is brought in the Supreme Court or in a county court, the trial judge may order that the plaintiff shall not recover any costs.

59.05

(2) Where the plaintiff obtains a default judgment that is within the monetary jurisdiction of a small claims court, the costs shall be assessed on the small claims court scale.

59.05(2)

- New. At the suggestion of Courts Administration this provision (similar to R. 657) has been included.

(3) Where a proceeding is dismissed for want of jurisdiction, the court may make an order in respect of the costs of the proceeding.

59.05(3)

- Williston 59.05(2), L.R.

(2) Where the proceeding is dismissed for want of jurisdiction, the court shall nevertheless have jurisdiction over the costs of that proceeding.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		59.06
Costs of Litigation Guardian	59.06	**59.06 Costs of Litigation Guardian**
59.06(1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent and may further order that the successful party pay those costs only to the extent that he is able to recover them from the party liable for his costs.	- L.R. The wording has been amended to make it clear, as Judge Coo suggested, that the court may make an order for payment of the litigation guardian's costs but deny recovery of those costs if the successful party does not succeed in collecting.	(1) In a proper case, the court may order a successful party to pay the costs of a litigation guardian of a party under disability who is a defendant or respondent only to the extent that the successful party is able to recover them from the party liable for his costs.
(2) Where a litigation guardian is ordered to pay costs, he is entitled to recover them from the person under disability for whom he has acted, unless otherwise ordered.	- L. Perry raises an important issue with significant financial implications. If a successful plaintiff is to be relieved from paying the costs of the Official Guardian when the Official Guardian has acted for the defendant, a significant source of revenue for the Official Guardian's office will be gone. In the past, the costs of the litigation guardian have been considered as one of the plaintiff's costs of engaging in litigation. On the other hand, since it is the system that imposes the requirement of a litigation guardian, why should the plaintiff have to pick up the tab, especially where he cannot collect on his judgment? What is the sub-committee's view?	(2) Where a litigation guardian is ordered to pay costs, he is entitled to recover any such costs paid by him from the person under disability for whom he has acted, unless otherwise ordered.

Revised Rules of Civil Procedure

Costs of Abandoned Motion, Application

59.07(1) Where a party has served a notice of motion and abandons the motion or fails to bring the motion on for hearing within sixty days after service, the party on whom the notice has been served is entitled to the costs of the motion forthwith, unless otherwise ordered.

(2) The costs of any such motion may be assessed without an order, on production of the notice of motion served and an affidavit that the motion was not set down within the time prescribed by subrule (1), or on production of the notice of abandonment of motion served, as the case may be, and, if the costs are not paid within seven days after assessment, the party entitled to costs may issue execution for them.

(3) Subrules (1) and (2) apply, with necessary modifications, to a notice of application.

Comments

59.07(1)

- L.R. The procedure for abandoning a motion will be dealt with under the revised rule 37. The costs consequences have been retained here. An arbitrary time period of sixty days for bringing a motion on for hearing has been imposed, as the intention is that frivolous motions which are not proceeded with should give rise to immmediate and automatic costs consequences. The sixty day time period permits the responding party to obtain his costs forthwith after the time expires.

59.07(2)

- L.R. The changes are consequential on the changes made in subrule (1). W. McBride questions why it is necessary to mention that a party may issue execution for costs here. The reason is that there is not yet a judgment on which execution could issue and indeed there is not even an order that gives rise to the assessment of costs.

59.07(3)

- L.R. The reference to a notice of appeal has been left out because the costs consequences for abandoned appeals are dealt with in rule 62.

Williston's Proposed Rules

59.07

59.07 Costs of Abandoned Motion, Application or Appeal

(1) Where a party serves a Notice of Motion and fails to set the motion down within the time prescribed by these rules, he shall be deemed to have abandoned the motion, and unless otherwise ordered, the party upon whom the notice has been served is thereupon entitled to the costs of the motion.

(2) A party who serves a Notice of Motion may countermand it by notice served on the opposite party who is thereupon entitled to the costs of the motion.

(3) The costs of any such motion may be taxed without an order, upon production of the Notice of Motion served, with an affidavit that the motion was not set down within the time prescribed by these rules, or upon the production of the notice of countermand served, as the case may be, and, if the costs are not paid within 7 days after taxation, the party entitled thereto may issue execution therefor.

(4) The provisions of this sub-rule shall apply, with any necessary modification, to a Notice of Application or to a Notice of Appeal.

Revised Rules of Civil Procedure

Liability of the Solicitor for Costs

59.08(1) In any proceeding where a solicitor for any party has [acted in manifest disregard of the interests of justice and has thereby] caused costs to be incurred [improperly or] without reasonable cause, or wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs as between the solicitor and his client or directing the solicitor to repay to his client money paid on account of costs;

(b) directing the solicitor to reimburse his client for any costs that the client has been ordered to pay to any other party; and

(c) ordering the solicitor personally to pay the costs of any party.

(2) Such an order may be made by the court on its own motion or on the motion of any party to the proceeding, but no such order shall be made unless the solicitor is given a reasonable opportunity to make representations to the court.

(3) The court may direct that notice of an order against a solicitor under this rule shall be given to his client in such manner as is specified in the order.

Comments

59.08(1)

- Williston 59.10(1), L.R. The square bracketed words in the second and third lines set an extremely high threshold for an order of costs against a lawyer. The Working Group is of the view that the wording is too narrow and imposes a stricter test than the existing case law, when in fact the contrary was intended. New Brunswick rule 59.13 uses the phrase, "as acted in disregard of the interests of justice and, without reasonable cause, as cause costs to be wasted or incurred improperly...". W.C. McBride suggests that "improperly" be replaced by "unnecessarily". The Working Group proposes that all the square bracketed words be omitted.

- In clause (a), words have been added to cover the case where a client has already paid money on account to his solicitor.

59.08(2)

- Williston 59.10(2).

59.08(3)

- Williston 59.10(3), L.R.

Williston's Proposed Rules

59.08

59.10 **Liability of the Solicitor for Costs**

(1) In any proceeding where a solicitor for any of the parties has acted in manifest disregard of the interests of justice and has thereby caused costs to be incurred improperly, or without reasonable cause, or wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs as between the solicitor and his client;

(b) directing the solicitor to reimburse his client for any costs that the client has been ordered to pay to any other party; and

(c) ordering the solicitor personally to pay the costs of any party.

(2) Such an order may be made by the court, on its own motion, or on the motion of any party to the proceeding, but no such order shall be made unless the solicitor is given a reasonable opportunity to make representations to the court.

(3) The court may direct that notice of any order against a solicitor under this sub-rule shall be given to his client in such manner as may be specified in the order.

Williston 59.11

Williston 59.11

- This rule has been omitted entirely by the Working Group. The Ministry is considering whether this provision is defensible as a matter of policy. The Ontario Law Reform Commission recommended that the present equivalent, Rule 696, should be removed from the rules and inserted in a statute. This provision is not expected to survive in its current form after its review by the Ministry. The provision is seldom if ever used and probably unknown to the vast majority of the legal profession. The Working Group recommends that it not be included in the rules.

59.11 Charging Order

(1) Where a solicitor has been employed to commence, continue or defend any proceeding, a judge may, upon an application, declare such solicitor, or his personal representative, to be entitled to a charge upon the property recovered or preserved through the instrumentality of such solicitor, for his costs, charges and expenses of or in reference to such proceeding, and all conveyances and acts done to defeat, or which may operate to defeat, such right, unless made to a bona fide purchaser for value without notice, are absolutely void and of no effect as against such charge.

(2) The judge may make an order for taxation of such costs, charges and expenses and for the raising and payment of the same out of the property.

59.08 (Williston)

- This is an extremely long and detailed provision, which the working group proposes become a new rule 60. Our revision has been prepared accordingly.

RULE 60 ASSESSMENT OF COSTS

The Working Group has broken out the rules relating to assessment of costs from Williston rule 59 and put them in a separate rule. The length and detailed nature of the provisions and the fact that they form a discrete subject matter seem to lend themselves to a separate rule. The provisions are based on Williston rule 59.08. The order of the provisions has been changed somewhat, and headings have been added for convenience of reference.

New 60.01

RULE 60 ASSESSMENT OF COSTS

General

60.01 Where, under a statute, order or rule, costs of a proceeding are to be assessed between party and party, the costs are to be assessed by an assessment officer in accordance with rules 60.02 to 60.10.

60.01

- New. This provision is intended as an introduction to the topic and a brief explanation of what assessment of costs is about.

Assessment Officer

60.02(1) In a county court, the clerk of the court is the assessment officer.

(2) In the Supreme Court, every local registrar and deputy local registrar is an assessment officer.

(3) Subject to subrule (5), the costs of a reference may be assessed by an assessment officer or by the person conducting the reference, and for the purpose of rules 60.01 and rules 60.03 to 60.10, the person cnducting the reference shall be deemed to be an assessment officer.

(4) Subject to subrule (5), costs shall be assessed by the assessment officer in the office where the proceeding was commenced.

(5) In a Supreme Court proceeding, any party may require that costs be assessed by an assessment officer at Toronto.

60.02

- Largely new, but based in part on Williston 59.08(2). The assessment officers for the two courts are identified, although in the Supreme Court there will, of course, be persons specially appointed as assessment officers as they are now appointed taxing officers.

(2) *Taxing Officer*

Where any party is entitled to costs which have not been fixed, such costs may be taxed by the local taxing officer where the proceeding was commenced, but where the proceeding is in the Supreme Court, such costs shall be taxed, at the election of any party to the proceeding, by a taxing officer at Toronto.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		New 60.03
Assessment at Instance of Party Entitled 60.03(1) A party entitled to costs may file a bill of costs with the assessment officer and obtain a notice of appointment for assessment of costs (Form 60A) from the appropriate assessment officer. (2) The notice and the bill of costs shall be served on every party interested in the assessment at least seven days before the date fixed for the assessment.	60.03 - Based on Williston 59.08(3)(a).	(3) *Procedure on Taxation* (a) A party entitled to tax a party and party bill of costs may file with the taxing officer, a copy of the bill of costs and obtain a Notice of Appointment to Tax a Party and Party Bill of Costs (Form 59A) from the appropriate taxing officer and serve a copy of the notice and the bill of costs on every party interested in the taxation at least 7 days before the date fixed for taxation.
Assessment at Instance of Party Liable 60.04(1) Where a party entitled to costs refuses or neglects to bring in his bill of costs for taxation within a reasonable time, any party liable to pay the costs may obtain a notice of appointment to deliver a bill of costs for assessment (Form 60B) from the appropriate assessment officer. (2) The notice shall be served on every party interested in the taxation at least twenty-one days before the date fixed for the assessment. (3) On being served with the notice, the person required to deliver his bill of costs shall file and serve a copy of it on every party interested in the assessment at least seven days before the date fixed for the assessment.	60.04(1) to (3) - Based on Williston 59.08(3)(b). W.C. McBride suggests that seven days is too long a period, both here and in subrule 60.03(2). The Working Group felt that seven days was not an inordinate period.	(b) Where a party entitled to tax a party and party bill of costs refuses or neglects to bring in his bill of costs for taxation within a reasonable time, any party liable to pay such costs may obtain a Notice of Appointment to Deliver a Party and Party Bill of Costs for Taxation (Form 59B) from the appropriate taxing officer and serve a copy thereof on every party interested in the taxation at least 21 days before the date fixed for the taxation. Upon being served with such a notice, the person required to deliver and tax his party and party bill of costs shall file and serve a copy thereof on every party interested in the taxation, at least 7 days before the date fixed for the taxation.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		New 60.04
(4) Where a party required to deliver a bill of costs for assessment fails to do so at the appointed time and thereby prejudices another party, the assessment officer may fix the costs of the defaulting party at a nominal sum or at such sum as he considers appropriate, in order to prevent further prejudice to the other party.	60.04(4) - Based on Williston 59.08(3)(c), with revisions as suggested by W.C. McBride.	(c) Where a party is required to deliver a bill of costs for taxation and fails to do so at the appointed time, to the prejudice of any other party, the taxing officer may allow the defaulting party a nominal or other sum for costs so as to prevent such other party being prejudiced by such default.
Assessment in Accordance with Tariffs *Generally* 60.05(1) Where party and party costs are to be assessed, the assessment officer shall assess and allow, (a) fees and disbursements in accordance with Tariff A; and (b) disbursements made to the court, an official examiner or a sheriff for fees payable under the regulations under the Administration of Justice Act, and no other fees, disbursements or other charges shall be assessed or allowed unless otherwise ordered.	60.05(1) - Williston 59.08(1)(a), L.R., for the sake of clarity.	(1) *Applicability of Tariffs* (a) On a taxation of party and party costs, fees and disbursements according to Tariff "A" to these rules and such other disbursements according to the applicable tariff fixed by regulation pursuant to *The Administration of Justice Act* shall be taxed and allowed, and no other fees, disbursements, allowances or charges than therein set forth shall be taxed or allowed in respect of the matters therein provided for, unless otherwise ordered.
Students-at-law (2) Where services authorized by the Law Society of Upper Canada as being within the competence of articled students-at-law are rendered by such a student, the fees shall be assessed and allowed at an amount equal to one-half of the amount set out in Tariff A.	60.05(2) - Williston 59.08(1)(b), L.R. W.C. McBride asked how the assessment officer was to determine what services were permitted by the Law Society. The Law Society recently published a rule outlining the services articled students may perform in the courts.	(b) In cases where services authorized by the Law Society of Upper Canada as being within the competence of articled students-at-law are rendered by such a student, the fees and allowances shall be taxed and allowed at an amount equal to one-half of the amount set down in Tariff "A".

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules 406 New 60.05
Disbursements (3) No disbursements other than fees paid to the court shall be assessed or allowed unless it is established by the solicitor appearing on the assessment or by affidavit that the disbursement was made or the party is liable for it.	60.05(3) - Williston 59.08(4)(e), L.R. W.C. McBride questioned the necessity of this rule, in that affidavits of disbursements are rare and no assessment officer would allow a disbursement unless it was established by satisfactory evidence. Should this subrule be dropped?	(e) Unless otherwise ordered, no disbursements, other than fees paid to officers of the court, shall be allowed or taxed unless the payment thereof or the liability therefor is established, either by the solicitor appearing on the taxation, or by affidavit.
Set-off of Costs (4) Where parties are liable to pay costs to each other, the assessment officer may adjust the costs by way of set-off.	60.05(4) - Williston 59.08(4)(d), L.R.	(d) Where a party entitled to receive costs from another party is required to pay costs to that party, the taxing officer may adjust the costs by way of set-off.

New 60.06

Costs of Particular Proceedings

Estates Administration Act

60.06(1) Costs payable out of the proceeds of land sold, mortgaged or leased under the Estates Administration Act shall be assessed according to Tariff D to these rules.

60.06(1)

- Williston 59.08(1)(c), L.R. Is there sufficient business of this kind to warrant a separate tariff?

(c) Costs payable out of the proceeds of land sold, mortgaged or leased under *The Devolution of Estates Act* shall be taxed and allowed according to Tariff "B" to these rules.

Passing of Accounts

(2) The costs of passing the accounts by a trustee, personal representative of a deceased person or a committee shall be fixed according to the tariff provided for the passing of accounts in a surrogate court, subject to increase in the discretion of the assessment officer where the tariff in his opinion is inadequate, but such discretion may be reviewed by a judge on the motion of any person affected.

60.06(2)

- Williston 59.08(1)(d), L.R.

(d) On the passing of accounts by a trustee or a personal representative of a deceased person or by a committee, the master shall fix the costs of such passing of accounts according to the tariff provided for the passing of accounts in a surrogate court, subject to increase in his discretion where the tariff in his opinion is inadequate, but such discretion may be reviewed by a judge on the motion of any person affected thereby.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		New 60.06
Administration or Partition (3) In a proceeding for administration or partition, each person represented by a solicitor and entitled to costs out of the estate, other than creditors not parties to the proceeding, is entitled to his actual disbursements in the proceeding, not including counsel fees, unless a judge orders otherwise, instead of costs in accordance with the Tariffs. (4) There shall be allowed for the other costs of the proceeding payable out of the estate a commission on the amount realized or on the value of the property partitioned, apportioned among the persons entitled to costs, as is just. (5) Subject to such increase or decrease as is recommended by a master and approved by a judge, the commission shall be as set out in Tariff C and the commission shall be instead of all fees, whether between party and party or between solicitor and client.	60.06(3) to (5) - Williston 59.08(1)(e), L.R. and split into subrules. Again, is there sufficient business of this kind to warrant a special tariff?	(e) In a proceeding for administration or partition, unless otherwise ordered by a judge, instead of the costs being taxed and allowed according to the applicable tariffs, each person properly represented by a solicitor and entitled to costs out of the estate, other than creditors not parties to the proceeding, is entitled to his actual disbursements in the proceeding, not including counsel fees, and there shall be allowed for the other costs of the proceeding payable out of the estate, a commission on the amount realized or on the value of the property partitioned, which commission shall be apportioned among the persons entitled to costs, as may seem just. Subject to such increase or decrease, as may be recommended by a master and approved by a judge, such commission shall be as set out in Tariff "C" to these rules and such remuneration shall be instead of all fees whether between party and party or between solicitor and client.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		New 60.06
Costs out of Fund or Estate (6) Where costs are to be paid out of a fund or estate, the assessment officer may direct what parties are to attend on the assessment and he may disallow the costs of any party whose attendance he considers unnecessary because the interest of the party in the fund or estate is small or remote or is sufficiently protected by other interested parties.	60.06(6) - Williston 59.08(4)(a), L.R.	(4) *Discretion of the Taxing Officer* (a) On the taxation of costs to be paid out of a fund or an estate, the taxing officer may direct what parties are to attend on the taxation and he may disallow the costs of any party whose attendance he considers unnecessary by reason of the interest of such party in the fund or estate being small or remote or sufficiently protected by other interested parties.
Several Actions on an Instrument (7) Where several actions are brought on one instrument, a successful plaintiff may recover the costs assessed in one action only, at the election of the plaintiff, and only the actual disbursements in the other actions, unless the court orders otherwise.	60.06(7) - Williston 59.08(4)(b), L.R.	(b) Where several actions are brought on one bond, recognizance, promissory note, bill of exchange or other instrument, there shall be collected or recovered the costs taxed in one action only, at the election of the plaintiff, and the actual disbursements only in the other actions, unless the court otherwise orders.
Member of Class with Separate Solicitor (8) Where any one of the persons constituting a class formed by a master for representation in his office by one solicitor insists on being represented by a different solicitor, he shall pay the costs of his own solicitor and all further costs occasioned to any of the parties by his being represented by a different solicitor.	60.06(8) - Williston 59.08(4)(c), L.R.	(c) Where any one of the persons constituting a class formed by a master for representation in his office by one solicitor insists on being represented by a different solicitor, he shall pay the costs of his own solicitor and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so designated.

New 60.07

Certificate of Assessment

60.07(1) On the assessment of party and party costs, the assessment officer shall set out the amount of costs assessed and allowed in his certificate of assessment of costs (Form 60C).

(2) Subject to appeal under rule 60.09, the certificate conclusively determines the amount of costs against all parties who received notice of the assessment.

60.07

- Williston 59.08(3)(d), L.R. and split into subrules. W.C. McBride asks why the conclusion of subrule 2 refers to only parties who receive notice. Presumably only the parties affected by the assessment of costs received notice, but if that is the case, perhaps the subrule could end with the word "costs" in the second line.

(d) On any taxation of party and party costs, the taxing officer shall certify the amount of the costs taxed by him and, subject to appeal, his Certificate (Form 59C) is final and conclusive as to the amount therein specified against all parties who have received notice of the taxation.

Objections to Assessment

60.08(1) On request, the assessment officer shall withhold his certificate for seven days or such other time as he directs, in order to allow a party who is dissatisfied with the decision of the assessment officer in respect of any item to serve on every other party interested and the assessment officer objections in writing to the decision, specifying concisely the item objected to.

60.08

- Williston 59.08(5), L.R.

(5) *Objections to Taxation*

(a) Upon request, the taxing officer shall withhold his certificate for 7 days, or such other time as he may direct, in order to allow a party who is dissatisfied with the allowance or disallowance by the taxing officer of the whole or any part of any item to deliver to every other party interested therein and to the taxing officer, objections in writing to such allowance or disallowance, specifying concisely the item objected to.

New 60.08

(2) A party on whom objections have been served may, within seven days after service or such other time as the assessment officer directs, serve a reply to the objections on every other party interested and the assessment officer.

(3) The assessment officer shall then reconsider and review his assessment in view of the objections and reply, and he may receive further evidence in respect of the objections, and he may, and if requested he shall, state in writing the reasons for his decision on the objections.

(b) A party upon whom objections have been served may, within 7 days of such service, or within such other time as the taxing officer may direct, deliver to every other party interested therein and to the taxing officer, a reply thereto.

(c) The taxing officer shall then reconsider and review his taxation upon such objections and reply, if any, and he may receive further evidence in respect thereof, and he may, and if requested be shall, state in writing the grounds and reasons for his decision thereon.

Appeal from Assessment

60.09(1) A party may appeal to a judge from a decision of an assessment officer on any question of principle or on any item in respect of which objections have been filed.

(2) The time for and the procedure on the appeal shall be governed by Rule 63 as if the appeal were from an interlocutory order of a master.

60.09

- Williston 59.08(6), L.R.

(6) *Appeal from Taxation*

(a) A party may appeal from any decision of any officer taxing costs upon any question of principle or as to any item in respect of which objections bave been duly filed, in a Supreme Court proceeding, to a judge of the Supreme Court or, in a county court proceeding, to a judge of that court.

(b) The time for any such appeal and the procedure thereon shall be governed by the provisions of Rule 63 as if the appeal were from an interlocutory judgment or order of a master, local judge, local master or other officer.

Revised Rules of Civil Procedure

Costs of a Sheriff

60.10(1) A sheriff claiming fees or expenses that have not been assessed shall, on being required by a party, furnish the party with his bill of costs and have the costs assessed by an assessment officer in his county or a neighbouring county.

(2) A sheriff shall not collect any fees or expenses after he has been required to have them assessed until the assessment has been completed.

(3) Either the sheriff or the party requiring the assessment may obtain an appointment for the assessment and the procedure on the assessment shall be the same as in the case of an assessment between party and party.

(4) The sheriff is entitled to his fees and expenses on the enforcement of a writ of seizure and sale, even where no money is realized on the seizure or sale.

(5) Where a person liable under a writ of seizure and sale is dissatisfied with the amount of fees or expenses claimed by a sheriff in respect of the enforcement of the writ, he may make a motion to a judge, before or after payment, on notice to the sheriff and, if the amount appears to be unreasonable, even though it is in accordance with the Tariff, the judge may reduce the amount or order the amount to be refunded on such terms as are just.

Comments

60.10

Williston 59.09, L.R. Subrule (1) takes account of courts administration's point that most sheriffs are also local registrars and therefore are assessment officers. To avoid having a sheriff assess his own bill of costs, subrule (1) provides that the assessment officer in a neighbouring county has jurisdiction to do so.

Williston's Proposed Rules

New 60.10

59.09 Costs of a Sheriff

(1) A sheriff claiming any fees, expenses or remuneration that have not been taxed shall, upon being required by either party and on payment of the prescribed fee, furnish such party with a copy of his bill of costs and have the same taxed by the proper taxing officer in his county.

(2) A sheriff shall not, without taxation, collect any fees, costs or expenses after he has been required to have the same taxed.

(3) Either the sheriff or the party requiring taxation may obtain an appointment for the taxation and the procedure thereon shall be the same as in the case of a taxation between party and party.

(4) The sheriff is entitled to his fees and expenses on the enforcement of a Writ of Seizure and Sale, even where no money is realized on the seizure or sale.

(5) Where a person liable under a Writ of Seizure and Sale is dissatisfied with the amount of fees or expenses claimed by a sheriff in respect of the enforcement thereof, he may apply to a judge, before or after payment thereof, upon notice to the sheriff and, if the amount appears to be unreasonable, notwithstanding that it is in accordance with the tariff, the judge may reduce the amount, or order the amount to be refunded upon such terms as may seem just.

TARIFF A
Solicitors' Fees and Disbursements in
Supreme Court and County Courts
Allowable Under Rule 60.05

>

Long Title

The long title has been deleted by the Working Group as being unnecessary and unhelpful.

General Comment on Tariff Amounts

W.C. McBride has suggested that all dollar amounts shown in the tariff of solicitors' fees be deleted and that instead a regime of costs in the discretion of the assessment officer be substituted. He points out that most of the important items in the tariff have an articifial ceiling that can be removed in the discretion of the assessment officer, and questions the utility of putting a number there at all. The Working Group feels that a numbered guide-line in the tariff is useful to the profession and to the assess-ment officer as a sort of general standard around which costs will be settled between the parties or around which the assessment officer will base his discretion.

The Working Group invites the sub-committee to consider the appropriate-ness of the dollar amount for each tariff item in light of present economic realities.

TARIFF "A"
Fees and Disbursements
Supreme Court and County Courts
Allowable Under Rule 59.08

TARIFF OF FEES FOR THE SERVICES OF A SOLICITOR AND OF DISBURSEMENTS ALLOWABLE TO A PARTY ENTITLED TO COSTS IN A PROCEEDING IN THE SUPREME COURT OR A COUNTY COURT AND IN A PROCEEDING UNDER ANY STATUTE BEFORE A JUDGE OF THE SUPREME COURT OR A JUDGE OF A COUNTY COURT OR BEFORE ANY JUDICIAL OFFICER

REVISED RULES OF CIVIL PROCEDURE

PART 1 - SOLICITORS' FEES

1. Pleadings.....not more than $75.00

   This item includes preparation and commencement or defence of an action and covers all services, except motions, up to and including delivery of pleadings.

   Subject to increase, in the discretion of the assessment officer, in cases [of difficulty or] involving $15,000.00 or less, up to $150.00, and in cases [of exceptional difficulty or] involving more than $15,000.00, up to $250.00.

2. Discovery of documents.....not more than $40.00

   This item includes affidavits of documents, requests to inspect and production for inspection.

   Subject to increase, in the discretion of the assessment officer, in cases [or difficulty or] involving $15,000.00 or less, up to $100.00, and in cases [of exceptional difficulty or] involving more than $15,000.00, up to $200.00.

COMMENTS

Tariff A Item 1

The Working Group has inserted the square bracketed words for consideration by the sub-committee, as not all proceedings involve monetary amounts (custody, injunction). Is it desirable to restrict increased solicitors' fees to cases involving money? Is difficulty an appropriate criterion for an increased fee?

The square bracketed words have been inserted in several other places in the tariff where there is a discretion to increase the fee.

Tariff A Item 2

Williston Tariff A Item 2, L.R.

WILLISTON'S PROPOSED RULES

Tariff A

PART 1 - FEES

1. Pleadings:

   Includes preparation for an commencement of defence of an action. This item covers all services except those of motions, up to and including delivery of pleadings, up to $75.00

   Subject to increase, in the discretion of the taxing officer, in cases involving up to $15,000.00, up to $150.00, and in cases involving over $15,000.00, up to $250.00.

2. Discovery of Documents:

   This item includes affidavits of documents, requests to inspect and production for inspection, up to $40.00

   Subject to increase, in the discretion of the taxing officer, in cases involving up to $15,000.00, up to $100.00, and in cases involving over $15,000.00, up to $200.00.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES 415 Tariff A
3. Drawing and settling issues on a special case.....$50.00 Subject to increase in the discretion of the assessment officer up to $250.00.	Tariff A, Item 3 Williston Tariff A Item 3, L.R.	3. Drawing and settling issues on stated cases ..... $50.00 Subject to increase, in the discretion of the taxing officer, up to $250.00.
4. Counterclaim against an added party, cross-claim or third party claim.....$25.00	Tariff A Item 4 Williston Tariff A Item 4, L.R.	4. Counterclaim against an added party, a Cross-Claim or a Third Party Claim $25.00
5. Setting down for trial.....$20.00	Tariff A, Item 5 Williston Tariff A Item 5, L.R.	5. Setting down for trial $20.00
6. Motions.....$50.00 This item includes preparation, counsel fee, and settling, signing and entering the order. Subject to increase, in the discretion of the assessment officer, in cases [of difficulty or] involving $15,000.00 or less, up to $1,500.00. In cases [of exceptional difficulty or] involving more than $15,000.00, an increased fee may be allowed in the discretion of the assessment officer.	Tariff A, Item 6 Williston Tariff A Item 6, L.R.	6. Motions ..... $50.00 Including preparation, counsel fee, and the settling, signing and entering of order. Subject to increase, in the discretion of the taxing officer, in cases involving up to $15,000.00, up to $150.00; in cases involving more than $15,000.00, an increased fee may be allowed in the discretion of the taxing officer.

REVISED RULES OF CIVIL PROCEDURE

7. Applications.....not more than $150.00

This item includes all preliminary steps, notices, affidavits, correspondence, preparation, counsel fee on hearing and attendance to hear judgment.

Subject to increase, in the discretion of the assessment officer. A fee to junior counsel on the application may be allowed in the discretion of the assessment officer.

8. Examinations.....not more than $75.00

This item applies to each examination for discovery or examination of a party or witness other than at a trial or hearing, including preliminary steps, preparation and counsel fee.

Subject to increase, in the discretion of the assessment officer, in cases [of difficulty or] involving $15,000.00 or less, up to $150.00. In cases [of exceptional difficulty or] involving more than $15,000.00, an increased fee may be allowed in the discretion of the assessment officer.

9. Pre-trial conference.....$50.00

This item includes preparation, counsel fee and preparation of memorandum and order.

Subject to increase, in the discretion of the assessment officer, in cases [of difficulty or] $15,000.00 or less, up to $150.00, and in cases [of exceptional difficulty or] involving more than $15,000.00, up to $250.00.

COMMENTS

Tariff A Item 7

Williston Tariff A Item 7, L.R.

Tariff A Item 8

Williston Tariff A Item 8, L.R.

Tariff A Item 9

Williston Tariff A Item 9, L.R.

WILLISTON'S PROPOSED RULES

Tariff A

7. Applications:

Including all preliminary proceedings, notices, affidavits, services, etc., correspondence, preparation, counsel fee on hearing and attendance to hear judgment, up to $150.00

Subject to increase, in the discretion of the taxing officer. A fee to junior counsel on the application may be allowed in the discretion of the taxing officer.

8. Examinations, up to $75.00

For each examination for discovery or cross-examination of a party or witness other than at a trial or hearing, including preliminary proceedings, preparation and counsel fee.

Subject to increase, in the discretion of the taxing officer, in cases involving up to $15,000.00, up to $150.00; and in cases involving more than $15,000.00, an increased fee may be allowed in the discretion of the taxing officer.

9. Pre-Trial Conference $50.00

Including preparation, counsel fee and preparation of memorandum and order.

Subject to increase, in the discretion of the taxing officer, in cases involving up to $15,000.00, up to $150.00, and in cases involving more than $15,000.00, an increased fee may be allowed in the discretion of the taxing officer, up to $250.00.

14. Appeals,

(a) to an appellate court.....[?]

This item includes all preliminary steps, notices, appeal books, factums, preparation, counsel fee on a motion for leave to appeal, counsel fee on appeal and attendance to hear judgment. The fee to be allowed is in the discretion of the assessment officer.

A fee to junior counsel on the argument of the appeal may be allowed in the discretion of the assessment officer.

(b) to a judge of the Supreme Court or a county court.....$50.00

This item includes preparation, counsel fee and settling, signing and entering the order.

Subject to increase, in the discretion of the assessment officer, in cases [of difficulty or] involving $15,000.00 or less up to $150.00. In cases [of exceptional difficulty or] involving more than $15,000.00, an increased fee may be allowed in the discretion of the assessment officer.

Tariff A Item 14

Williston Tariff A Item 14, L.R. This is the only major item where no solicitors' fee is specified. Is this desirable, or should an amount be inserted?

14. Appeals

(1) To an Appellate Court

Including all preliminary proceedings, notices, services, etc., appeal books, statements of law and fact, preparation, counsel fee on a motion for leave to appeal, counsel fee on appeal and attendance to hear judgment in the discretion of the taxing officer.

A fee to junior counsel on the argument of the appeal may be allowed in the discretion of the taxing officer.

(2) To other than an Appellate Court $50.00

Including preparation, counsel fee, and the settling, signing and entering of order.

Subject to increase, in the discretion of the taxing officer, in cases involving up to $15,000.00, up to $150.00; in cases involving more than $15,000, an increased fee may be allowed in the discretion of the taxing officer.

15. References

This item includes all preliminary steps, notices, affidavits, appointments, attendances, correspondence, preparation, counsel fee on reference and preparing, settling, signing, serving and filing the report. The fee to be allowed is in the discretion of the assessment officer.

In a sale action, additional fees may be allowed in the discretion of the assessment officer for arranging for a private sale or a sale by tender or for preparation of conditions of sale and the advertisement, arranging for advertising and for an auctioneer, conducting the sale, arranging for payment of the purchase price and for the preparation of a conveyance where one is executed.

Tariff A Item 15

Williston Tariff A Item 15, L.R. The third paragraph in Williston has been deleted and has been replaced instead by an additional subrule in rule 60.02 on page 403 above.

15. References

Including all preliminary proceedings, notices, affidavits, appointments, services, etc., attendances, correspondence, preparation, counsel fee on reference, report, including attendances and signing same, serving and filing report, in the discretion of the taxing officer.

In addition to the above fee, in the discretion of the officer taxing, additional fees may be allowed in a sale action for preparation of conditions of sale and advertisement, arranging for advertising and for auctioneer, conducting sale, arranging for payment of purchase price and for the preparation of a conveyance where one is executed or for arranging a private sale.

The fees provided in the above paragraphs may be taxed by the officer hearing the reference or by the taxing officer, subject to any direction in the order of reference.

REVISED RULES OF CIVIL PROCEDURE

16. Writ of seizure and sale and each renewal thereof.....$10.00

17. Obtaining order to continue and service thereof where occasioned by the death or the transmission of interest of an opposite party.....$50.00

18. Assessment of costs

The assessment officer may, in his discretion, award or refuse the costs of an assessment to either party, the costs to be assessed by him when awarded.

NOTES: 1. Where questions of special importance are involved or matters of substance are determined a further increased fee or a fee to junior counsel may be allowed in respect of items 1, 2, 6 and 9, in the discretion of the assessment officer.

2. Where for any reason the services covered by an item were not completed, the fees may be reduced proportionately by the assessment officer.

3. Any item of a counterclaim may be assessed as in a separate action and any item common to claim and counterclaim may be apportioned.

COMMENTS

Tariff A Item 16

Williston Tariff A Item 16, L.R.

Tariff A Item 17

Williston Tariff A Item 17, L.R.

Tariff A Item 18

Williston Tariff A Item 18, L.R.

Notes to Tariff A - Part I

Williston Tariff A Note 1, L.R.

WILLISTON'S PROPOSED RULES

Tariff A

16. Writ of Seizure and Sale and each renewal thereof $10.00

17. Obtaining Order to Continue and service thereof where occasioned by the death or the transmission of interest of an opposite party $50.00

18. Taxation of Costs

The taxing officer may, in his discretion, award or refuse the costs of a taxation to either party, such costs to be taxed by him when and as allowed.

NOTES TO TARIFF "A" - PART I

(1) Where questions of special importance and difficulty are involved or matters of substance are determined, a further increased fee or a fee to junior counsel may be allowed in respect of items 1, 2, 6 and 9 in the discretion of the taxing officer.

(2) Where, for any reason the services covered by an item were not completed, the fees may be apportioned by the taxing officer.

(3) Any item of a counterclaim may be taxed as in a separate action and any item common to claim and counterclaim may be apportioned or divided.

Tariff A

PART II - DISBURSEMENTS

19. Attendance money actually paid to a witness. Witnesses [other than parties, etc.] are entitled to be paid attendance money calculated as follows:

1. Attendance allowance for each day of necessary attendance.....$40.00

2. Travel allowance, where the trial, hearing or examination is held,
   (a) in a city or town in which the witness resides, $2.00 for each day of necessary attendance;
   (b) within 300 kilometres of where the witness resides, 25 cents a kilometre each way between his residence and the place of trial, hearing or examination;

   (c) more than 300 kilometres from where the witness resides, the minimum return air fare plus 25 cents a kilometre from his residence to the airport and from the airport to the place of trial, hearing or examination.

3. Overnight accommodation allowance, where the witness resides elsewhere than the place of trial, hearing or examination and is required to remain overnight, $40.00 for each overnight stay.

Tariff A Item 19

Williston Tariff A Item 19, L.R. The square bracketed portion will have to be amplified or deleted in light of the sub-committee's decision on whether parties are to be entitled to attendance money under any circumstances.

Williston sub-item 20(1) has been deleted and incorporated in the first line of this item.

PART II - DISBURSEMENTS

19. Conduct money payable to witnesses, excluding parties to the action, unless the party is required to attend under Rule 55.05

(1) Each day of necessary attendance $40.00

(2) (a) where the trial is held in the city in which the witness resides, $1.00 for each day of necessary attendance at trial;

(b) where the trial is within 200 miles of where the witness resides, 40 cents a mile or 25 cents a kilometer between his residence, the place of trial, and return;

(c) where the trial is more than 200 miles from where the witness resides, the minimum return air fare plus 40 cents a mile or 25 cents a kilometer to and from airports, his residence and the place of trial; and

(3) Where the witness resides elsewhere than the place of trial and is required to remain at the place of trial overnight, $40.00 for each overnight stay.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES Tariff A
20. Fees paid to a court, official examiner or sheriff under the regulations under the Administration of Justice Act.	Tariff A Item 20 New. Added by the Working Group to take account of the fact that court, official examiner and sheriff fees are now prescribed by regulations made under the Administration of Justice Act.	
	Williston Tariff A Item 20 The various sub-items in Williston item 20 have been renumbered here as separate items, as they appear to be separate and distinct matters.	20. Fees recoverable from opposite party (1) Conduct money actually paid to a witness.
	see Tariff A Item 19	
21. For service or attempted service of a document, (a) in Ontario, the amount actually paid, not exceeding the fee payable to a sheriff under the regulations under the Administration of Justice Act; (b) outside Ontario, a reasonable amount; (c) that was ordered to be served by publication, a reasonable amount.	Tariff A Item 21 New. This item appears in the Unified Family Court rules. It fills a gap left by the Williston tariff.	

Tariff A

22. For the preparation of a plan, model or photograph necessary for the understanding of the evidence, a reasonable amount.

Tariff A Item 22

Williston sub-item 20(2) L.R.

(2) A reasonable sum may be allowed for the preparation of any plan, model or photograph when necessary for due understanding of the evidence.

23. For medical reports, hospital records and reports of experts that were supplied to the other parties as required by the Evidence Act and the rules and,
(a) that were used at the trial or hearing, a reasonable amount;
(b) that were not used at the trial or hearing, where the assessment officer considers that the reports or records were reasonably necessary for the conduct of the proceeding, a reasonable amount.

Tariff A Item 23

Williston sub-item 20(3) L.R. The Working Group has deleted the specific reference to the ten day period so as to avoid having the tariff unintentionally out of alignment with the Act or the rules if they should later be amended. Clause (b) is new, and is designed to allow recovery of the disbursement for a report or record where the case settles or for some other reason the report or record is not put in evidence.

(3) Reasonable sums may be allowed for medical reports, hospital records, and the reports of experts used or intended to be used at trial which have been supplied to the opposite party at least 10 days before trial.

24. The cost of the investigation and report of the Official Guardian.

Tariff A Item 24

Williston Tariff A sub-item 20(4).

(4) The cost of the investigation and report of the Official Guardian.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules Tariff A
25. For an expert who gives opinion evidence at the trial or hearing or whose attendance was reasonably necessary at the trial or hearing, a reaaonable amount not exceeding $250.00 a day, subject to increase in the discretion of the assessment officer.	Tariff A Item 25 Williston Tariff A sub-item 20(5), L.R. The item has been expanded to cover experts who do not give evidence but whose presence ia necessary to assist counsel.	(5) A reasonable sum may be allowed for fees actually paid to a witness who appears and gives opinion evidence, up to an amount of $250.00 for each day of giving evidence and each additional day authorized by the trial judge and subject to increase in the discretion of the taxing officer.
26. For an interpreter for servicea at the trial or hearing or on an examination, a reasonable amount not exceeding $75.00 a day, subject to increase in the discretion of the asaessment officer.	Tariff A Item 26 Williston Tariff A Item 20(6) L.R.	(6) A reasonable sum may be allowed for fees actually paid to an interpreter for services at trial or on an examination, up to $75.00 per day, subject to increase in the discretion of the taxing officer.
27. Where ordered by the presiding judge, such travelling and accommodation expenses incurred by a party as, in the discretion of the assessment officer, appear reasonable.	Tariff A Item 27 Williston Tariff A Item 20(7) L.R. Subject to revision in light of decision on whether parties are to receive attendance money.	(7) Where ordered by the presiding judge, such travelling and accommodation expenses incurred by a party to an action as, in the discretion of the taxing officer, appear reasonable.
28. For copies of any documents or authorities prepared by a party for the use of the court and supplied to the opposite party, a reasonable amount.	Tariff A Item 28 Williston Tariff A Item 20(8) L.R.	(8) A reasonable sum to cover the cost of copies of any documents or authorities prepared by a party for the use of the court, and supplied to the opposite party.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules Tariff A
29. The cost of certified copies of documents such as judgments, orders, birth, marriage and death certificates, abstracts of title, deeds, mortgages and other registered documents where made exhibits.	Tariff A Item 29 Williston Tariff A Item 21.	21. The cost of certified copies of documents such as judgments, orders, birth, marriage and death certificates, abstracts of title, deeds, mortgages and other registered documents where made exhibits.
30. The cost of transcripts of proceedings of courts or tribunals, (a) where required by the court or the rules; or (b) where reasonably required for preparation for the trial or hearing or for the understanding of the evidence.	Tariff A Item 30 Williston Tariff A Item 22, L.R.	22. The cost of transcripts of proceedings of courts or tribunals when required by the court or the rules, or where, in the discretion of the taxing officer, reasonable required for the preparation for trial or where necessary to the due understanding of the evidence.
31. For any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer.	Tariff A Item 31 New. Added by the Working Group as a general catch-all to cover any other reasonably necessary disbursement. Is it desirable?	

Tariff B

TARIFF B
Solicitors' Fees in Uncontested Divorce Proceedings
Allowable Under Rule 72.27

1. Pleadings.....not more than $60.00

2. Discovery of documents.....not more than $20.00

3. Examinations.....not more than $75.00

   This item applies to each examination of a witness before trial, except an examination for use on a motion, including preliminary steps, preparation and counsel fee.

4. Uncontested motions.....not more than $20.00

   This item applies to each uncontested motion before trial, including preliminary steps, affidavits, preparation, counsel fee and order.

5. Contested motions.....not more than $75.00

   This item applies to each contested motion before trial, including preliminary steps, affidavits, cross-examination, preparation, counsel fee and order.

6. Counsel fee on pre-trial conference.....not more than $20.00

7. Counsel fee at trial, including preparation.....not more than $200.00

8. Settling, signing and entering decree nisi, including assessment of costs.....not more than $20.00

9. Motion for decree absolute, including preparation, counsel fee and order.....not more than $30.00

Tariff B

Williston Tariff B. The long title has been dropped for the same reason as it was dropped in the case of Tariff A. Minor wording changes have been made in this tariff, but no change of substance. The counsel fee for item 7 has been rounded up to $200.

TARIFF "B"
Fees in Uncontested Divorce Proceedings
Allowable Under Rule 72.27

TARIFF OF FEES FOR THE SERVICES OF A SOLICITOR ALLOWABLE TO A PARTY ENTITLED TO COSTS IN AN UNCONTESTED DIVORCE PROCEEDING

1. Pleadings, up to $60.00
2. Discovery of Documents, up to $20.00
3. For each examination of a party or a witness prior to trial, except an examination or cross-examination for use on a motion, but including preliminary proceedings, preparation and counsel fee, up to $75.00
4. For each uncontested motion before trial, including preliminary proceedings, affidavits, preparation, counsel fee and order, up to $20.00
5. For each contested motion before trial, including preliminary proceedings, affidavits, cross-examination, preparation, counsel fee and order, up to $75.00
6. Counsel fee on pre-trial conference, up to $20.00
7. Counsel fee at trial, including preparation, up to $180.00
8. Settling, signing and entering Decree Nisi, including taxation of costs, up to $20.00
9. Motion for Decree Absolute, including preparation, counsel fee and order, up to $30.00

Revised Rules of Civil Procedure

TARIFF C
Commission Allowable in Administration or Partition Proceedings Under Rule 60.06

On the first $1,000.....15 per cent

On every $100 over $1,000 and up to $2,500..... 5 per cent

On every additional $100 over $2,500 and up to $5,000..... 4 per cent

On every additional $100 over $5,000 and up to $10,000..... 3 per cent

On every additional $1,000 over $10,000 and up to $15,000..... 2 per cent

On every additional $1,000 over $15,000... 1 per cent

Comments

Tariff C

Williston Tariff C, with a slight change in the title.

Williston's Proposed Rules

Tariff C

TARIFF "C"
Commission Allowable Under Rule 59.08 (1) (e)

On the first $1,000 ..... 15 per cent
On every $100 over $1,000 and up to $2,500 ..... 5 per cent
On every additional $100 over $2,500 and up to $5,000 ..... 4 per cent
On every additional $100 over $5,000 and up to $10,000 ..... 3 per cent
On every additional $1,000 over $10,000 and up to $15,000 ..... 2 per cent
On every additional $1,000 over $15,000 ..... 1 per cent

REVISED RULES OF CIVIL PROCEDURE

TARIFF D
Costs Allowed on Estates Administration Act Proceedings Under Rule 60.06

To the Solicitor for the Personal Representative

1. Where sale price or amount of mortgage is under $200.....$10.
Where it is over $200, up to and including $400.....$12.
Where it is over $400, up to and including $600.....$15.
Where it is over $600, up to and including $800.....$20.
Where it is over $800, up to and including $1,000.....$25.
Where it is over $1,000, up to and including $1,500.....2½%
Where it is over $1,500, up to and including $2,000.....$7 plus 2%
Where it is over $2,000, up to and including $3,000.....$17 plus 1½%
Where it is over $5,000.....$57 plus ½ of 1%

Where a part of the land of an estate has been sold, in the case of any subsequent sale, three-fourths of the foregoing amount shall be allowed.

2. In addition to the above amounts there shall be allowed,

(a) the fees paid to the surrogate court for taking out letters of administration or letters probate, where there is no personal estate out of which such costs can be paid;

(b) the proper disbursements for advertising for creditors where there is no personal estate out of which such disbursements can be paid;

(c) where the sale is by auction, the auctioneer's fee and the costs of all necessary printing of advertisements; and

(d) the fees paid to valuators.

COMMENTS

Tariff D

Williston Tariff D, with a slight change in the title and a minor wording change in clause 2(a).

WILLISTON'S PROPOSED RULES

Tariff D

TARIFF "D"
Costs Allowed on Sales, Leases and Mortgages of Land Under The Devolution of Estates Act

To the Solicitor for the Personal Representative

1. Where sale price or amount of mortgage is under $200. ... $10.
Where it is over $200, up to and including $400. ..... $12.
Where it is over $400, up to and including $600. ..... $15.
Where it is over $600, up to and including $800. ..... $20.
Where it is over $800, up to and including $1,000. ..... $25.
Where it is over $1,000, up to and including $1,500. .... 2½%
Where it is over $1,500, up to and including $2,000.,$7 plus 2%
Where it is over $2,000, up to and including $3,000, ... $17 plus 1½%
Where it is over $5,000, ... $57 plus ½ of 1%

Where a part of the land of an estate has been sold, in the case of any subsequent sale, three-fourths of the foregoing amount shall be allowed.

2. In addition to the above amounts there shall be allowed,

(a) the cost of taking out letters of administration or letters probate and of succession duty affidavits as fixed by the Surrogate Court Rules, where there is no personal estate out of which such costs can be paid;

(b) the proper disbursements for advertising for creditors where there is no personal estate out of which such disbursements can be paid;

(c) where the sale is by auction, the auctioneer's fee and the costs of all necessary printing of advertisements; and

(d) the fees paid to valuators.

Tariff D

Costs of Official Guardian

3. The costs of the Official Guardian shall be one-third of the amount allowed under item 1, and his actual disbursements.

Special Allowances

4. Where special circumstances render the amount taxable under this tariff unreasonable or inadequate, a judge may order the allowance of a smaller or larger sum.

NOTE: In applying this tariff to leases, the amount shall be deemed to be the annual rental multiplied by the number of years in the term.

Costs of Official Guardian

3. The costs of the Official Guardian shall be one-third of the amount allowed under item 1., and his actual disbursements.

Special Allowances

4. Where special circumstances render the amount taxable under this tariff unreasonable or inadequate, a judge may order the allowance of a smaller or larger sum.

NOTE: In applying this tariff to leases, the amount shall be deemed to be the annual rental multiplied by the number of years in the term.

REVISED RULES OF CIVIL PROCEDURE

ORDERS

RULE 60 ORDERS

ENDORSEMENT BY JUDGE OR OFFICER

60.01(1) Subject to subrule (2), every order shall be endorsed on the trial record, notice of motion or notice of application, as the case may be, by the judge or officer making it.

(2) Where written reasons are delivered, the endorsement may consist of a simple reference to the reasons, and a copy of the reasons shall be filed in the court file.

(3) Where a clerk is present at the trial or hearing, he shall record the endorsement in a minute book.

FORM OF ORDER

60.02(1) An order shall be in Form 60A or 60B and shall contain,

(a) the name of the judge or officer who made it;

(b) the date on which it was made;

(c) a recital of the date of the trial or hearing, the parties who were present or represented by counsel and those who were not and any undertaking made by a party as a condition on which the order was made; and

(d) the date on which it was signed.

(2) An order is effective from the date on which it was made unless the order provides otherwise.

COMMENTS

RULE 60 ORDERS

60.01(3)

- New (cf. present R.264) added at suggestion of B. Doran and courts administration.

60.02(1)

- Williston 60.03(1)and (2), re-drafted, forms added as suggested by courts administration.

60.02(2)

- Cf. Williston 60.03(1).

WILLISTON'S PROPOSED RULES

Old 60.01

JUDGMENTS

RULE 60 SETTLING, SIGNING AND ENTERING JUDGMENTS

60.01 Endorsement by Judge or Officer

(1) Subject to paragraph (2), every judgment shall be endorsed on the trial record, notice of motion or notice of application, as the case may be, by the judge or officer giving it.

(2) Where written reasons for a judgment are delivered, the endorsement may consist of a simple reference to the reasons, and a copy of the reasons shall be filed in the court file.

60.03 Form of Judgment

(1) Every judgment shall show on its face the day of the week, the month and the year on which it was given and shall take effect from that date. Except where required by the rules or by any statute to be made by the registrar, the judgment shall show the name of the judge or officer who gave it.

(2) Every judgment given by a judge or officer shall recite in its preamble the date upon which the trial or hearing took place, the parties who were present at the trial or hearing in person or by counsel and those who were not, and shall recite any undertaking made by a party as a condition upon which the judgment was given.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES Old 60.02
(3) The operative parts of an order shall be divided into convenient paragraphs, numbered consecutively.	60.02(3) - Williston 60.03(3), L.R.	(3) The operative parts of a judgment shall be divided into convenient paragraphs, numbered consecutively.
(4) An order directing payment into court on behalf of a minor shall show the date of birth and the full address of the minor and shall direct that a copy of the order be served on the Official Guardian.	60.02(4) - Williston 60.03(4), L.R. - Lloyd Perry seemed to be suggesting that this subrule should contain a provision similar to R.542 indicating that no payment to a guardian, next friend or committee of a person under disability was a valid discharge as against that person. Working Group. Revised rule 7.07 and 7.08 are to provide that a judge may order that money not be paid into court so now we cannot have a provision like R.542. Also the Children's Law Reform Act will permit, in certain circumstances, the payment of a child's money to a guardian or person having custody.	(4) A judgment directing payment into court on behalf of a minor shall show the date of birth and the full address of the minor and shall direct that a copy thereof be served on the Official Guardian.
(5) An order for the payment of costs shall direct payment to the party entitled to receive the costs and not to his solicitor.	60.02(5) - Williston 60.03(5), L.R.	(5) A judgment for the payment of costs shall direct payment to the party entitled to receive such costs and not to his solicitor.
(6) An order for the payment of money on which interest is payable under section 00 of the Judicature Act shall set out the rate of interest and the date from which interest is payable.	60.02(6) - New. Added at suggestion of B. Doran. Similar to present R.519(2).	
	Williston 60.03(6) and (7) - (Re judgments directing a reference) have been transferred to 56.03.	

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		Old 60.03
DRAFTING, SETTLING AND SIGNING ORDERS		
General		
60.03(1) Every order shall be settled and signed by the registrar at the place of trial or hearing or where the proceeding was commenced, unless the judge or officer who made the order has settled and signed it.	60.03(1) - Williston 60.04(1), L.R.	60.04 Settling and Signing Judgment (1) Every judgment shall be settled and signed by the registrar at the place of trial or hearing, or by the registrar at the place where the proceeding was commenced, unless the judge or officer giving the judgment has himself settled and signed it.
(2) Where an order states that it may be signed only on the filing of an affidavit or the production of a document, the registrar shall examine the affidavit or document and ascertain that it is regular and sufficient before signing the order.	60.03(2) - Williston 60.04(3), L.R.	(3) Where it is directed by a judgment that it may only be signed upon the filing of an affidavit or the production of a document, the registrar shall examine the affidavit or document and ascertain that it is regular and sufficient before signing the judgment.
(3) Where a judge or officer has ceased to hold office after making an order but before the order is signed, another judge or officer having jurisdiction to make such an order may settle and sign it.	60.03(3) - New. Similar to present R.537(6). Inserted at suggestion by B. Doran.	
Drafting and Approval of Formal Order		
(4) Any party affected by an order may prepare a draft of the formal order and shall serve a copy of it on all other parties represented at the trial or hearing for approval as to its form.	60.03(4) - Williston 60.02(1), L.R.	60.02 Drafting and Approval of Formal Document (1) Any party affected thereby may prepare a draft of the formal judgment and a copy thereof shall be submitted to all other parties represented at the trial or hearing for approval as to its form.
(5) Where approval as to form is not received within a reasonable time, a party may obtain an appointment for the settling of the order by the registrar or, where necessary, by the judge or officer who made it, and notice of the appointment shall be served on all other parties affected.	60.03(5) - Williston 60.02(2), L.R.	(2) Where such approval is not received within a reasonable time, an appointment shall be obtained for the settling of the judgment before the registrar or, where deemed necessary, before the judge or officer giving it, and the appointment shall be served on all other parties represented at the trial or hearing.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		Old 60.03
(6) In a case of urgency, the order may be settled and signed by the judge or officer who made it without the approval as to form of any of the parties represented at the trial or hearing.	60.03(6) - Williston 60.02(3), L.R.	(3) In a case of urgency, the judgment may be settled and signed by the judge or officer who gave it without the approval of any of the parties represented at the trial or hearing as to its form.
Clarification (7) Where an objection is taken to the form of the order on its settlement before a registrar, the registrar shall settle the order in the form he considers proper and the objecting party may make a motion for clarification of the part of the order to which objection has been taken.	60.03(7) - Part of Williston 60.04(2), L.R.	60.04(2) Where an objection is taken to the form of the judgment on its settlement before a registrar, the registrar shall settle the judgment in the form he deems proper and grant leave to the party taking the objection to attend, within a reasonable time, upon the judge or officer giving the judgment for clarification of that part of the judgment to which objection has been taken. Where clarification is not sought within the stated time, the judgment as settled by the registrar shall stand. Where clarification is received, the registrar shall resettle the judgment accordingly, and sign it.
(8) The motion shall be made to the judge or officer who made the order or, where the order was made by a court consisting of more than one judge, to the judge who presided at the hearing or any other judge designated by him.	60.03(8) - New. B. Doran suggested that provision had to be made for settling appellate court judgments (cf. present R.538(3) and (4)).	
(9) Where a motion for clarification is not made within seven days, the judgment as settled by the registrar shall stand.	60.03(9) - A part of Williston 60.04(2), L.R.	
(10) Where clarification is received, the registrar shall resettle the order accordingly and sign it, if the judge or officer has not settled and signed it.	60.03(10) - Part of Williston 60.04(2)	

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		Old 60.04
ENTRY OF ORDER		
Every order to be entered		
60.04(1) Every order shall be entered in accordance with subrules (2) to (7) immediately after it is signed and the party having the order signed shall file the original and sufficient copies for that purpose with the registrar.	60.04(1) - New - added for clarity.	
(2) The registrar shall enter an order by, (a) noting at the foot of the original, the entry book in which a certified copy is to be inserted or the microfilm on which the original is to be photographed, as the case may be, together with the date when the insertion or photograph was made; and (b) inserting a certified copy in an entry book or microfilming the original.	60.04(2) - Williston 60.05(1), L.R.	60.05 Entry of Judgment (1) Entry of a judgment shall be made by the registrar, (a) inscribing at the foot of the original of the document a notation as to the Entry Book in which an authenticated copy is to be inserted or the film on which the original is to be photographed, as the case may be, together with the date when such insertion or photograph was made; and (b) inserting an authenticated copy thereof in an Entry Book, or photographing the original document on microphotographic film.
Where Order to be Entered		
(3) Every order shall be entered in the office of the registrar in which the proceeding was commenced and a copy of the order as entered shall be filed in the court file.	60.04(3) - Williston 60.05(2), L.R.	(2) Every judgment shall be entered in the office of the registrar in which the proceeding was commenced and a copy thereof as entered shall be filed in the court file.
(4) An order by which a prior order is affirmed, reversed, set aside, varied or amended shall also be entered in the office where the original order was entered.	60.04(4) - (5) - Williston 60.05(3) - (4), L.R.	(3) Every judgment by which a prior judgment is affirmed, reversed, set aside, varied, modified or amended shall, in addition to any other entry thereof, be entered in the office where the original judgment was entered.
(5) An order of an appellate court shall also be entered in the office of the local registrar at Toronto.		(4) A judgment of an appellate court shall also be entered in the office of the local registrar at Toronto.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		old 60.04
(6) The certificate of the Registrar of the Supreme Court of Canada as to an order made on an appeal or motion for leave to appeal to that court shall be entered in the office of the local registrar at Toronto and in the office of the regisrar in which the proceeding was commenced and the order may be enforced as if it were an order of the court from which the appeal was taken.	60.04(6) - Williston 60.05(5) as amended as suggested by B. Doran.	(5) The certificate of the Registrar of the Supreme Court of Canada as to a judgment made on an appeal to that court shall be entered in the office of the local registrar at Toronto and in the office of the registrar in which the proceeding was commenced.
Entry of Certificate of Assessment of Costs (7) The certificate of an assessment officer as to the assessment of party and party costs awarded by an order shall be entered in the office of the registrar in which the order was entered and shall be cross-indexed with the order.		(6) The certificate of a taxing officer as to the taxation of party and party costs awarded by a judgment shall be entered in the office of the registrar in which such judgment was entered and shall be cross-indexed therewith.
AMENDMENT OF ORDER 60.05 An order may be amended on a motion in the proceeding where, (a) there are clerical mistakes in the order or errors arising from an accidental slip or omission; or (b) the order requires amendment in any particular on which the court did not adjudicate.	60.05 - Williston 60.06(a) and (b), L.R.	60.06 **Amendment of Judgment** Any judgment may be amended on a motion in the proceeding where, (a) there are clerical mistakes in the judgment or errors arising from an accidental slip or omission; (b) the judgment requires amendment in any particular on which the court did not adjudicate; or

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		Old 60.06
REVERSAL OR VARIATION OF ORDER **60.06** Where a party is entitled to, (a) the reversal or variation of an order on the ground of matter arising or discovered after it was made; (b) impeach an order on the ground of fraud; (c) suspend the operation of an order; (d) carry an order into operation; or (e) any further or other relief than that originally awarded, he may make a motion in the proceeding for the relief claimed.	60.06 - Williston 60.05(c), L.R. - given a separate rule as suggested by B. Doran.	60.05 (c) a party is entitled to maintain an action for the reversal or variation of the judgment upon the ground of matter arising subsequent to the making thereof or subsequently discovered, to impeach the judgment on the ground of fraud, or to suspend the operation of the judgment, or to carry the judgment into operation, or for any further or other relief than that originally awarded.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
RULE 61 ENFORCEMENT OF ORDERS	RULE 61 ENFORCEMENT OF ORDERS General Comments Williston Rule 61.01 - 61.04 were a catalogue of the methods by which various types of orders may be enforced. Since they were not exhaustive they have been revised where necessary to refer to all the relevant enforcement methods. Sequestration was dealt with in various places in Williston (e.g. 61.07 re writ of delivery, 61.11(4) re money judgments, 61.11(2) and (3) re contempt) but there was no general provision dealing with the obtaining of a Writ of Sequestration. This is now dealt with in 61.08.	RULE 61 ENFORCEMENT OF JUDGMENTS

- Courts Administration. Pointed out that under present R.540 where the amount due is less than $200 no execution may issue against land. They suggest that a similar provision be added. Working Group. We think the Williston Committee omission of this exception was sound. An execution for less than $200 will show up on a conveyancing search so the land cannot be sold. The ability to sell the land (the creditor must wait six months) will usually ensure payment. At most we would suggest that it be added to the 61.06(4) list of cases where leave is required.

ENFORCEMENT OF ORDER FOR PAYMENT
OR RECOVERY OF MONEY

61.01(1) An order for the payment or recovery of money may be enforced by,

(a) a writ of seizure and sale (Form 61A) under rule 61.06;

(b) garnishment under rule 61.07;

(c) a writ of sequestration (Form 61B) under rule 61.08; and

(d) the appointment of a receiver under section 00 of the Courts of Justice Act.

- Court Administration notes that present R.551 (re executions against partnership assets where the judgment debtor is a partner) has been omitted and suggest it go back in. Working Group. We agree it should be retained but the Execution Act is the better place.

61.01(1)

- Williston 61.01(1) redrafted. Since the purpose of this rule is to list the methods available to enforce money judgments, to be accurate it must be more extensive - garnishment has been added (to cover Williston 61.12) as has sequestration (to cover Williston 61.11(4)). Is the reference to a receiver a desirable addition and is it accurate?

61.01 Enforcement of Judgment for Payment or Recovery of Money

(1) A judgment for the payment or recovery of money may be enforced by the issue of a Writ of Seizure and Sale (Form 61A) against the property of the debtor.

(2) Where under these rules a party is entitled to costs on the basis of a certificate of assessment of costs without an order awarding him costs, and the costs have not been paid within seven days after the signature of the certificate of assessment of costs, the party may enforce payment of the costs by the means set out in subrule (1) on filing an affidavit setting out the basis of his entitlement to costs and a certified copy of the certificate of assessment.

61.01(2)

- New. . This is a general provision which has been added by the Working Group to permit the issuing of an execution based upon a certificate of assessment of costs where there is no judgment or order.

ENFORCEMENT OF ORDER FOR POSSESSION OF REAL PROPERTY

61.02 An order for the recovery or delivery of the possession of land may be enforced by a writ of possession (Form 61C) under rule 61.09.

61.02

- Williston 61.02, L.R.

61.02 Enforcement of Judgment for Possession of Real Property

A judgment for the recovery or delivery of the possession of land may be enforced by the issue of a Writ of Possession (Form 61B).

ENFORCEMENT OF ORDER FOR DELIVERY OF PERSONAL PROPERTY

61.03 An order for the delivery of personal property, other than money or an interest in land, may be enforced by a writ of delivery (Form 61D) or where the property is not delivered up pursuant to a writ of possession, by a writ of sequestration (Form 61B) under rule 61.08.

61.03

- Williston 61.03 and 61.07. The procedure provided in Williston 61.07 (and presently by R.580(2)) is really a form of sequestration. To avoid a multiplicity of forms of execution it has been described as a writ of sequestration (which is further dealt with below, revised rule 61.08).

61.03 Enforcement of Judgment for Delivery of Personal Property

A judgment for the delivery of any personal property, other than land or money, may be enforced by the issue of a Writ of Delivery (Form 61C).

61.07 Writ of Delivery

Where the property is not delivered up by the judgment debtor pursuant to a Writ of Delivery served upon him and cannot be found or taken by the sheriff, the judgment creditor may apply to a judge for an order directing the sheriff to take any other personal property of the judgment debtor not exceeding double the value of the property in question, to be kept by him pending any further order of the court to enforce obedience to the judgment.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		61.04
ENFORCEMENT OF ORDER TO DO OR ABSTAIN FROM DOING ANY ACT 61.04 An order requiring any [party] to do any act, other than the payment of money, or to abstain from doing any act, may be enforced against the [party] refusing or neglecting to obey the order under rule 61.10. ^	61.04 - Williston 61.04(1). Unlike the proceeding Williston "cataloging" rules, this Williston rule on the enforcement of orders to do acts etc. (61.04(1) - (3)) went on to spell out how and when the contempt order may be obtained. To be consistent with the treatment of Writs of Seizure & Sale & Garnishment the provision relating to the obtaining of the contempt order has been transferred below to revised rule 61.10.	61.04 **Enforcement of Judgment to Do or Abstain from Doing any Act** (1) A judgment requiring any party to do any act, other than the payment of money, or to abstain from doing any act, may be enforced against the party refusing or neglecting to obey the judgment by a contempt order made by a judge on the motion of any party entitled to enforce obedience to the judgment and on notice to the party against whom the order is sought.
>	Williston 61.04(3) - Working Group suggests this subrule be deleted. It covers what is a typical term included in an order made on a contempt motion, but the rule seems to suggest that the judgment is amended, rather than expressing this term in the order.	(3) Where the judgment does not specify any time within which the act is to be done or abstained from, a judge may fix the time within which compliance is to be required.

ENFORCEMENT BY OR AGAINST A PERSON NOT A PARTY

61.05(1) Where an order is made for the benefit of a person who is not a party, he may enforce the order in the same manner as if he were a party.

(2) Where an order may be enforced against a person who is not a party, the order may be enforced against him in the same manner as if he were a party.

61.05

- Williston 61.08, L.R.

61.08 Enforcement by or against a Person not a Party

(1) Where a judgment is made for the benefit of a person who is not a party, that person shall be entitled to enforce obedience to the judgment by the same process as if he were a party.

(2) Where a judgment may be enforced against a person who is not a party, that person shall be liable to the same process for enforcing obedience to the judgment as if he were a party.

WRIT OF SEIZURE AND SALE

Where Available Without Leave

61.06(1) Where an order may be enforced by a writ of seizure and sale, the creditor is entitled, on requisition to the registrar [setting out the amount still owing,] to the issue of one or more writs of seizure and sale (Form 61A).

61.06(1)

- L.R. Should the requisition have to set out any amount already received and the date it was received - this is relevant to both the amount of the execution and the amount of post-judgment interest.

61.05 Writ of Seizure and Sale

(1) *Where Available Without Leave*

Where a judgment may be enforced by a Writ of Seizure and Sale, the judgment creditor is entitled to the issue of one or more Writs of Seizure and Sale.

(2) Where an order is for the payment of money into court, a writ of seizure and sale shall contain a notice that all money realized by the sheriff under the writ is to be paid into court.

61.06(2)

- Williston 61.01(2), L.R.

61.01 (2) Where a judgment is for the payment of money into court, a Writ of Seizure and Sale shall be endorsed with a notice to the effect that all money realized by the sheriff pursuant thereto is to be paid into court.

(3) Where an order is for payment within a specified time, a writ of seizure and sale shall not be issued until after the expiration of that time.

61.06(3)

- Williston 61.01(3), L.R.

(3) Where a judgment is for payment within a specified time, a Writ of Seizure and Sale shall not issue until after the expiration of that time.

Revised Rules of Civil Procedure

Where Leave is Required

(4) A writ of seizure and sale shall not issue for the enforcement of an order for the payment or recovery of money without first obtaining leave of the court where,

(a) six years or more have elapsed since the date of the order;

(b) a change has taken place, whether by death or otherwise, in the parties entitled or liable under the order;

(c) any property sought to be seized under a writ of seizure and sale is in the hands of a receiver appointed by the court; or

(d) the enforcement of the order is subject to the fulfilment of a condition or contingency.

(5) Where the court grants leave to issue a writ of seizure and sale and it is not issued within one year from the date of the order granting leave, the order granting leave ceases to have effect, but this does not prevent the granting of a subsequent motion for such leave.

Comments

61.06(4)

- Williston 61.05(2)(a).

- Re 61.06(4)(b). B. Doran and Courts Administration both suggested the reinsertion of part of present R.546 allowing the writ to be amended without leave where a party has changed his name. Working Group. We query this because in the course of an action, before judgment you would need leave of court to amend the title of the proceeding, so after judgment you should also need leave. We suggest the procedure should be a motion which could be without notice.

61.06(5)

- Williston 61.05(2)(b), L.R.

Williston's Proposed Rules

61.06

61.05 (2) *Where Leave is Required*

(a) A Writ of Seizure and Sale shall not issue for the enforcement of a judgment for the payment of recovery of money without first obtaining leave of the court where,

(i) six years or more have elapsed since the date of the judgment;

(ii) a change has taken place, whether by death or otherwise in the parties entitled or liable under the judgment;

(iii) any property sought to be seized under a Writ of Seizure and Sale is in the hands or a receiver appointed by the court; or

(iv) the enforcement of the judgment is subject to the fulfilment of any condition or contingency.

(b) Where the court grants leave to issue a Writ of Seizure and Sale and it is not issued within one year from the date of the order granting such leave, the order granting leave shall cease to have effect, but nothing in this clause shall preclude the granting of a subsequent application for such leave.

Revised Rules of Civil Procedure

Duration and Renewal

(6) A writ of seizure and sale remains in force for six years from the date of its issue and for a further six years from each renewal.

(7) Where a writ of seizure and sale is filed with a sheriff, he shall mail a notice of its expiration not less than thirty days nor more than sixty days before expiration of the writ to the party who filed it, addressed to him at his address shown on the writ.

(8) A writ of seizure and sale that is filed with a sheriff may be renewed by filing with him before its expiration a request to renew (Form 61E) and the sheriff shall endorse on the writ a memorandum stating the date of its renewal, and a writ of seizure and sale so endorsed is entitled to priority according to the time of the last filing of the writ.

(9) A writ of seizure and sale that is not filed with a sheriff may be renewed before its expiration by filing with the registrar who issued it a requisition to renew the writ and the registrar shall endorse on the writ a memorandum stating the date of its renewal.

Comments

61.06(6)-(9)

- Williston 61.05(3)(a) - (d).

Williston's Proposed Rules

61.06

(3) *Duration and Renewal*

(a) A Writ of Seizure and Sale shall remain in force for 6 years from the date of its issue and for a further 6 years from each renewal thereof.

(b) Where a Writ of Seizure and Sale is filed with any sheriff, he shall serve notice of its expiration by mailing such notice not less than 30 days nor more than 60 days prior to such expiration to the party who filed the Writ of Seizure and Sale addressed to him at the last address of such person endorsed thereon.

(c) A Writ of Seizure and Sale which is filed with any sheriff may be renewed by filing with him before its expiration a Request to Renew (Form 61D) and the sheriff shall endorse and sign upon the Writ of Seizure and Sale a memorandum stating the day, month and year of such renewal, and a Writ of Seizure and Sale so endorsed shall be entitled to priority according to the time of the last filing thereof.

(d) A Writ of Seizure and Sale which is not filed with any sheriff may be renewed by filing with the registrar who issued it before its expiration a Request to Renew, and the registrar shall endorse and sign upon the Writ of Seizure and Sale a memorandum stating the day, month and year of such renewal.

Revised Rules of Civil Procedure

(10) A requisition to renew a writ shall indicate the amount still owing to the creditor under the order, including post-judgment interest.

Writs of Seizure and Sale to be Endorsed

(11) Every writ of seizure and sale shall bear the name and address of the party and of his solicitor, if any.

Direction to Levy

(12) A creditor who has filed a writ of seizure and sale with a sheriff may file with the sheriff a direction to levy (Form 61F) setting out the amount still owing to the creditor, including post-judgment interest, and directing the sheriff to levy that amount and an amount sufficient to recover his fees and expenses.

Seizure of Goods

(13) Where goods are seized under a writ of seizure and sale, the sheriff shall, on request, deliver an inventory to the [owner], his agent or employee before the goods are removed from the premises on which they have been seized.

Comments

61.06(10)

- Added as suggested by Courts Administration, Form 61D will have to be amended also.

61.06(11)

- Williston 61.05(4)(b), L.R.

61.06(12)

- Cf. Williston 61.05(4)(a). Courts Administration recommended that the direction to levy be a separate document, not an endorsement on the writ because present practice is to ignore the endorsed direction to levy.

61.06(13)

- Williston 61.05(5). Working Group changed "chattels" to "goods" as the latter seems a broader term. Present R.557 used "goods or chattels". Does either term cover money?

- "Owner" appears in Williston and present rule 557, instead of "debtor". Would the owner of goods seized ever be someone other than a debtor?

Williston's Proposed Rules

(4) *Writs of Seizure and Sale to be Endorsed*
Every Writ of Seizure and Sale shall be endorsed with,

(a) a direction to any sheriff with whom the Writ is filed, or to be filed, to levy the amount still owing to the judgment creditor under the judgment and specifying that amount including interest thereon at the rate and from the date specified by the judgment. In addition to the sum so specified, the direction to levy shall direct the sheriff with whom the Writ is filed to levy an amount sufficient to recover his fees and expenses.

(b) the name and address of the party and of his solicitor, if any, directing a sheriff to levy.

(5) *Seizure of Chattels*
Where chattels are seized under a Writ of Seizure and Sale, the sheriff shall, on request, deliver to the owner, his agent or servant, an inventory thereof before they are removed from the premises from which they have been so seized

Revised Rules of Civil Procedure

Sale of Goods

(14) Goods seized under a writ of seizure and sale shall not be sold by the sheriff until he has,

(a) mailed to the execution creditor or his solicitor and to the [owner], his agent or employee, at their last known address, notice of the time and place of the sale, at least ten days before the date of the sale; and

(b) published notice of the time and place of the sale in a newspaper having a general circulation in the county where the goods have been seized.

Sale of Land

(15) A sale of land shall not be held under a writ of seizure and sale until after,

(a) the expiration of six months after the day on which the writ was filed with the sheriff or, where the writ has been withdrawn, from the day on which the writ was re-filed;

(b) the sheriff has mailed a notice of sale to the creditor or his solicitor and to the debtor at his last known address at least thirty days before the sale;

(c) the sheriff has published once in The Ontario Gazette at least thirty days before the sale and in a newspaper having a general circulation in the county in which the land is situate, an advertisement of sale once each week for two successive weeks, the last of such advertisements to be published not less than one week nor more than three weeks before the date of sale; and

(d) the sheriff has posted a notice of sale in a conspicuous place on the property to be sold and in his office for at least thirty days before the sale.

Comments

61.06(14)

- Williston 61.05(6), L.R.

61.06(15)

- Williston 61.05(7)(a), L.R. Note that both Williston and revised rule reduce the waiting time for a sale from the present 12 months to 6 months.

- Working Group. Williston omitted present R.562 which allows the court to authorize a sale without waiting the time limit where the debtor is absconding. Should this provision be reinserted?

Williston's Proposed Rules 61.06

(6) *Sale of Chattels*

Chattels seized under a Writ of Seizure and Sale shall not be sold by the sheriff until he has,

(a) mailed to the execution creditor or his solicitor and to the owner, his agent or employee, at the last known address, notice of the time and place of the sale, at least 10 days prior to the date of the sale; and

(b) published notice of the time and place of the sale in a newspaper having a general circulation in the county where the chattels have been seized.

(7) *Sale of Land*

(a) A sale of land shall not be held under any Writ of Seizure or Sale until,

(i) the expiration of 6 months from the day on which the Writ is filed with the sheriff or, where the Writ has been withdrawn, from the day on which the Writ is re-filed;

Williston 61.05(7)(a)(ii)

This provision required (as does present R.563) that before a sale of land may take place there must first be a "no goods" return in respect of the amount sought to be recovered. This provision has been deleted in line with the following Ontario Law Reform Commission recommendation:

(d) The Requirement of a Return of *Nulla Bona*

The next restriction on the sale of land concerns the requirement of a return of *nulla bona* Rule 563 of the Rules of Practice provides that no sale may take place until after a return of *nulla bona* by either a sheriff, in respect of a Supreme Court or county or district court judgment, or a bailiff, in respect of a small claims court judgment.

The prerequisite of a *nulla bona* return appears to be of little value. Since it is in the creditor's interest to enforce the debt as efficiently as possible, if freed from this prerequisite, he rarely would initiate a sale of land where a sale of personalty, which is normally less complicated, would yield sufficient proceeds. And where the creditor is undiscriminating or is actuated by spite,[82] the debtor can always forestall the sale of his land by selling his personalty voluntarily and paying the judgment debt.

At the present time, it would appear that in many cases a return of *nulla bona* is made virtually as a matter of course, unless specific items of exigible personalty are known to the creditor and expressly required to be seized. Admittedly, the recommendations proposed in Chapter 2 of Part II of our Report, concerning the seizure and sale of personal property, should make enforcement against personal property more manageable and more likely, and therefore should reduce the number of *pro forma* returns of *nulla bona*. However, even aside from the argument against the retention of Rule 563 advanced in the immediately preceding paragraph, and assuming that in the future the requirement were to provide some protection to debtors, its effect would be to impose upon creditors mandatory costs and delays for no apparent reason, where the debtor's personal property is insufficient and the creditor ultimately must look to his land. As Wilson, C.J.S.C., observed in the British Columbia case of *Re Execution Act; Re Schiava's Judgment*:[83]

> [I]f his judgment is for $2,000 it is a hardship to compel him to go through a process of execution which will realize only $200 and leave him still forced to resort to sale of lands, with consequent delay

Accordingly, we recommend that a return of *nulla bona* no longer should be required before an execution sale of land may proceed.

(ii) after the sheriff has made a return of *no goods* in respect of all or part of the amount directed to be levied;

(iii) the sheriff has mailed a notice of sale to the execution creditor or his solicitor and to the execution debtor at his last known address at least 30 days preceding the sale;

(iv) the sheriff has published once in The Ontario Gazette at least 30 days preceding the sale and in a newspaper having a general circulation in the county in which the land is situate, an advertisement of sale once each week for two successive weeks, the last of such advertisements to be published not less than one week nor more than 3 weeks preceding the date of sale; and

(v) the sheriff has posted a notice of such sale in a conspicuous place on the property to be sold and in his office for at least 30 days preceding the sale.

(16) The notice and advertisement shall specify,

(a) the property to be sold;

(b) the name of the plaintiff and defendant;

(c) the time and place of the intended sale; and

(d) the name of the debtor whose interest is to be sold.

61.06(16)

- Williston 61.05(7)(b).

(b) Such notice and advertisement shall specify,

(i) the property to be sold;

(ii) the name of the plaintiff and defendant;

(iii) the time and place of the intended sale; and

(iv) the name of the debtor whose interest is to be sold.

(17) Nothing in this rule prevents an adjournment of the sale to a future date without further notice or advertisement.

61.06(17)

- Williston 61.05(7)(c).

(c) Nothing in this rule shall be taken to prevent an adjournment of the sale to a future date without further notice or advertisement.

(18) Where an advertisement of a sale of land under a writ of seizure and sale is published in The Ontario Gazette before the writ expires, the sale may be completed by a sale and conveyance of the lands after the writ expires.

61.06(18)

- Williston 61.05(7)(d), L.R.

(d) The advertisement in The Ontario Gazette of any lands for sale under a Writ of Seizure and Sale during the currency of the Writ shall be deemed to be sufficient commencement of the sale to enable the Writ to be completed by a sale and conveyance of the lands after the Writ has expired.

Abortive Sale

(19) Where goods or land seized under a writ of seizure and sale remain unsold for want of buyers, the sheriff shall notify the creditor of the date and place of the attempted sale and of any other relevant circumstances.

61.06(19) and following

- New, incorporating present rules 558-559. Reinserted at suggestion of Courts Administration.

Rule 558

558. Where goods are seized by a sheriff under a writ of fieri facias and they remain unsold in his hands for want of buyers, he shall state in his return of "goods on hand for want of buyers", the time when and the place where such goods were offered for sale by him and the names of at least three persons who were present at the time of such attempted sale, if so many were present, but, if so many were not present, then the names of those who were present, if any, and that there were no others, and, if no person was present, then he shall state that fact.

Rule 559

559. Where a sheriff makes a return to a writ of fieri facias that he has goods and chattels or lands and tenements on hand for want of buyers, the execution creditor may give written instructions to the sheriff to expose for sale or sell, or cause to be sold, the said goods or lands for the best price that can be obtained for the same and the said writ of fieri facias shall continue in full force and effect as to any residue owing thereunder after such sale.

(20) On receipt of a notice under subrule (19), the creditor may instruct the sheriff in writing to cause the goods or land to be sold in such manner as the sheriff considers will realize the best price that can be obtained.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		61.07

GARNISHMENT

61.07 Generally

- The Williston rule governing garnishment is 61.12. It largely reproduces the existing rules 597 to 606. Garnishment in the county court and Supreme Court is seldom used because it is expensive and inefficient. The inefficiency arises chiefly because the county and Supreme Court procedures catch only debts that are due and payable at the time the garnishment process is served. The Williston rules attempted to deal with this particular problem, but did not change the general nature of garnishment, which today requires an order on motion.

  In its recent report on the enforcement of judgment debts, the Ontario Law Reform Commission made a number of recommendations concerning garnishment. The principal recommendations of the Commission are reproduced on the following page.

  The Working Group has drafted rule 61.07 so as to implement most of the procedural recommendations of the Commission. The principal changes are that garnishment will be available as of right from the registrar, although payment will be made to the sheriff. No appearance before the court will be necessary unless the creditor, the debtor or the garnishee seeks to have some issue resolved.

  The issues of what debts are subject to garnishment and whether continuing garnishment (that is, garnishment that operates repeatedly against wage payments although served only once) should be available are to be addressed by the Ministry either in the statute or in a special rules-authorizing provision.

110. Garnishment as an enforcement remedy should be expanded in scope so that it is of continuing effect, and this continuing garnishment remedy should be available to all classes of judgment creditor and in respect of all kinds of debt.

139. Subject to Recommendation 141, upon the filing with the enforcement office of a request for garnishment in a form prescribed by regulation, garnishment should be available as of right to enforce all judgments from all court levels (see also Recommendations 28-31).

140. The attachment of wages remedy available under section 30 of *The Family Law Reform Act, 1978* should be abolished and replaced by the proposed continuing garnishment remedy (see Recommendation 110). We do not intend by this Recommendation to do away with the priority to which a maintenance creditor is now entitled by virtue of section 30(3) of *The Family Law Reform Act, 1978*.

141. Upon default in payment of a support or maintenance order, a maintenance creditor should be entitled, as of right, to wage garnishment in the provincial court (family division) by filing a request for garnishment, in a form prescribed by regulation, with the clerk of the court. In all other respects, the procedure for wage garnishment in the family court should be the same as that in the case of garnishment generally (see Recommendations 142 *et seq.*).

142. When applying for garnishment, a judgment creditor should be required to complete, as part of the request for garnishment form, an affidavit, in a form prescribed by regulation, containing the following information:

    (1) the amount of the judgment to be enforced that remains outstanding;

    (2) the name and address of the persons who are indebted or who may become indebted to the judgment debtor (and the date, if known, that any conditional, contingent or future debts will become due and payable);

    (3) a statement that the judgment creditor has reason to believe and does believe that the persons named are indebted or may become indebted to the judgment debtor; and

    (4) a statement that the persons named are within Ontario or that such persons might be sued for the debt in Ontario by the judgment debtor.

143. By a single request for garnishment, a judgment creditor should be able to instruct the enforcement office to garnish any number of independent debts owed to the judgment debtor by different garnishees. The enforcement office should proceed to garnish such debts only as they are required to satisfy the unpaid amount of the creditor's judgment against the debtor; the order of garnishing multiple debts should be a matter determined by the enforcement office.

144. Upon receipt of a request for garnishment in the prescribed form, the enforcement office or the clerk of the family court, as the case may be, should be required to issue the requisite order, that is, a notice of garnishment.

145. A copy of the notice of garnishment should be served upon both the debtor and the garnishee either personally or by ordinary prepaid mail to the last known address of the debtor or garnishee.

146. Where a debt sought to be garnished is money on deposit in a bank, trust company or other savings institution, the notice of garnishment should be required to be served upon the branch in which the money is deposited.

147. In the case of service of a notice of garnishment by ordinary prepaid mail, service should be presumed to have been effected at the time that the notice actually is received or five days from the date of mailing, whichever is earlier.

148. A garnishee should be allowed to rebut the presumption of service by showing that the notice of garnishment was not received at all, or that it was received more than five days after it was mailed.

149. Every notice of garnishment should contain a statement advising the garnishee and judgment debtor of his right to dispute the notice of garnishment, and in the case of the judgment debtor, his right to apply for a variation of the proposed income exemption.

150. Service upon the garnishee of a notice of garnishment should bind all the debts owing by the garnishee to the judgment debtor, and after service of the notice of garnishment, payment by the garnishee of any debt otherwise than in accordance with the terms of the notice or an order of the court should be void as against the judgment creditor, and the garnishee should continue to be liable for such debt.

151. After being served with a notice of garnishment, the garnishee should have the right to pay to the enforcement office (or in the case of wage garnishment in the family court, to the clerk of the provincial court (family division)) the amount of his outstanding debts to the judgment debtor, or to file with the enforcement office (or in the case of wage garnishment in the family court, with the clerk of the provincial court (family division)) a dispute, setting out the grounds for his objection to the notice of garnishment.

152. The garnishee should be under an obligation, as he is now under Rule 603(1) of the Supreme Court of Ontario Rules of Practice, to notify the enforcement office (or the clerk of the provincial court (family division) in the case of wage garnishment in the family court) of any assignment of the debt, claim thereto, or charge thereon of which he has knowledge, and any such assignee, claimant or chargee should be notified of the proceedings and their right to dispute the notice of garnishment.

153. The judgment debtor also should be entitled to dispute a notice of garnishment.

154. Other interested parties, too, should be free to dispute a notice of garnishment.

155. A dispute should be required to be filed within ten days from the time the notice of garnishment is received or is presumed to have been received (see Recommendation 148), whichever is earlier.

GARNISHMENT

Obtaining Notice of Garnishment

61.07(1) Where the creditor under an order for the payment or recovery of money seeks to enforce it by garnishment, he shall file a requisition for garnishment together with an affidavit stating,

(a) the amount still owing to the creditor under the order, including post-judgment interest;

(b) the names and addresses of the persons to whom a notice of garnishment is to be directed;

(c) that the creditor has reason to believe and does believe that the persons are or will become indebted to the debtor;

(d) such particulars of the debts as are known to the creditor;

(e) where any such person is not in Ontario, that the debtor is entitled to sue him in Ontario to recover the debt, and the basis of the entitlement to sue in Ontario; and

(f) where any such person is not then indebted to the debtor but will become indebted to him, such particulars of the date on and circumstances under which the debt will arise as are known to the creditor.

61.07(1)

- See OLRC recommendations 139, 142 and 143

61.12 Garnishment Proceedings

(1) Where, on the motion of a judgment creditor, it is made to appear by affidavit that the judgment is unsatisfied and that some person is or will become indebted to the judgment debtor, the court may, by a Garnishee Order (Form 61H), order that all debts owing or accruing due from that person (hereinafter called the garnishee) to the judgment debtor, be attached to answer the judgment debt and that the garnishee do at a time and place therein named, attend and show cause why he should not pay into court the debt due or to become due from him to the judgment debtor, or so much thereof as is sufficient to satisfy the judgment debt and the claims of any other execution creditors.

(2) On the filing of the requisition and affidavit required by subrule (1), the registrar shall issue notices of garnishment (Form 61G) naming as garnishee the persons named in the affidavit.

Service of Notice of Garnishment

(3) Every notice of garnishment shall be served on the debtor and the garnishee.

61.07(2)

- See OLRC rec. 144.

61.07(3)

- See OLRC rec. 145. Should it be possible to serve a notice of garnishment on the garnishee by ordinary mail? Should it be possible to serve the debtor by ordinary mail where he has been noted in default? Where the debtor defended, the rules permit service by mail, but is this appropriate for a stranger to the litigation or a debtor under a default judgment?

61.12 (2) Notice of any such motion shall, unless dispensed with, be given to the judgment debtor.

Revised Rules of Civil Procedure

(4) Where the garnishee is a bank, trust company, loan corporation, credit union, caisse populaire or the Province of Ontario Savings Office, the garnishee shall be served at the branch at which the debt is payable.

Debt Bound from Time of Service

(5) The notice of garnishment binds the debt from the time of service on the garnishee.

Payment by Garnishee to Sheriff

(6) Where the garnishee admits all or part of the debt, he shall pay the amount of the debt that he admits to the sheriff with the particulars required by Form 61G.

Dispute of Garnishment

(7) Where the garnishee,

(a) disputes his liability or the amount of the debt;

(b) has notice of an assignment or encumbrance of the debt; or

(c) claims that the debt is not yet payable,

he shall, within ten days after service on him of the notice of garnishment, serve on the creditor and the debtor and file with the court a dispute of garnishment (Form 61H) setting out the particulars.

Comments

61.07(4)

- See OLRC rec. 146.

61.07(5)

- See OLRC rec. 150.

61.07(6)

- The notice of garnishment form (Form 61G) will require the garnishee to give the sheriff the names of the creditor, the debtor and the garnishee and the court file number.

61.07(7)

- See OLRC recs. 152, 154 and 155.

Williston's Proposed Rules

61.12(6) The order from the time of service binds the debts attached.

(7) If the garnishee admits his liability, he may pay the amount admitted into court, and give notice of such payment to the judgment creditor.

(8) Where the debtor,

(a) disputes his liability to the creditor or the amount of the debt;

(b) disputes the garnishee's liability to him or the amount of the debt;

(c) has assigned or encumbered the debt;

(d) claims that the debt is not yet payable,

he shall, within ten days after service on him of the notice of garnishment, serve on the creditor and the garnishee and file with the court a dispute of garnishment (Form 61H) setting out the particulars.

61.07(8)

- See OLRC recs. 153 and 155.

Garnishment Hearing

(9) Where the garnishee or the debtor files a dispute, the court [a judge?] on motion may determine the matter in a summary way or may direct the trial of an issue.

61.07(9) and following

- These provisions are based on Williston 61.12(8) and following, except that a motion by the creditor (or, conceivably, the debtor or garnishee) triggers the procedure for a hearing and a summary disposition of the matter or trial of an issue.

  Is this the kind of motion that would properly fall within the jurisdiction of a master?

61.12(10) If the garnishee disputes his liability, the court may determine the dispute in a summary way or may direct the trial of an issue.

(10) The court may order the assignee or encumbrancer of a debt to appear and state the nature and particulars of his claim.

(12) Where a garnishee has notice of an assignment of a debt or claim thereto, or a charge thereon, he shall give notice thereof, and the court may order the assignee or the claimant to appear and state the nature and particulars of his claim.

(11) Where the debt is not yet payable, the court may order payment to the sheriff when it becomes payable.

(9) If the debt is not payable at the time the motion is heard, an order may be made for the payment thereof when it becomes payable.

(12) Where the debt is of an amount recoverable in a county court or small claims court, the motion shall be made in the county court or small claims court within whose jurisdiction the garnishee resides, and all subsequent steps shall be taken in that court.

(11) Where the debt claimed to be due or accruing from the garnishee is of an amount recoverable in a county court, or in a small claims court, the order shall require the garnishee to appear before the judge of the County Court, or of the Small Claims Court within whose jurisdiction the garnishee resides, on a day to be appointed in writing by such judge, and the garnishee shall be served with notice of the day appointed and all subsequent proceedings shall then be taken and carried on before such judge.

Enforcement against Garnishee

(13) Where the garnishee does not pay into court the amount unpaid under the order set out in the notice to garnishee and does not serve or file a dispute of garnishment, the creditor is entitled on motion to the court to an order against the garnishee for payment of the amount that the court finds is owing to the debtor by the garnishee.

(14) Payment of the debt by the garnishee other than in accordance with a notice of garnishment or order under this rule after the notice or order is served on him is void as against the creditor and the court may order the garnishee to pay the debt to the creditor.

(8) If the garnishee does not pay into court the amount due from him to the judgment debtor and does not dispute the debt due or claimed to be due from him to the judgment debtor or, if he does not appear upon notice to him, then the court may order payment into court of the debt.

(5) The garnishee shall be deemed to be indebted although any debt sought to be attached has been assigned, charged or encumbered by the judgment debtor, if the assignment, charge or encumbrance is fraudulent as against creditors or is otherwise impeachable by them.

MISC. Williston 61.12

(3) Where the garnishee is within Ontario, the order shall be served upon him.

(4) Where the garnishee is not within Ontario,

(a) such an order may only be made where the debt to be attached is one for which the judgment debtor would be entitled to commence proceedings in Ontario against the garnishee;

(b) Notice of the Garnishee Order (Form 61 I) and not the order itself shall be served on the garnishee.

(13) Payment into court by the garnishee pursuant to a garnishee order is a valid discharge to him as against the judgment debtor or any assignee or claimant of whose claim he has given notice, and who has been called upon to show cause by an order made under this sub-rule.

WRIT OF SEQUESTRATION

Leave Required

61.08(1) A writ of sequestration (Form 61B) directing a sheriff to take possession of and hold the property of a person against whom an order has been made and to collect and hold any income from the property until the person complies with the order may be issued only with leave of [a judge].

(2) [A judge] may grant leave to issue a writ of sequestration where he is satisfied that other enforcement measures are or are likely to be ineffective.

(3) In granting leave to issue a writ of sequestration, the judge may order that the writ be enforced against all or part of the person's real and personal property.

Variation or Discharge

(4) [A judge] on motion may vary or discharge a writ of sequestration on such terms as are just.

61.08

- New - to provide a general procedure for obtaining a writ of sequestration. Williston referred to the writ in several contexts (e.g. 61.11(2)&(3)&(4)&(6) and see also 61.07 - in lieu of a writ of delivery). In the revised rule the writ is referred to in

  61.01(1) - order for payment of money
  61.03 - order for delivery of personal property
  61.10(3) - (4) - contempt

61.08(3)

This provision is added particularly to allow for the sequestration of only part of the person's property (as under Williston 61.07).

REVISED RULES OF CIVIL PROCEDURE

WRIT OF POSSESSION

Leave Required

61.09(1) A writ of possession shall only be issued with leave of the court, which may be obtained on a motion without notice.

(2) Leave to issue a writ of possession may be given only where the court is satisfied that all persons in actual possession of any part of the land,

(a) are parties to the proceeding; or

(b) have been given a notice of proceeding for possession (Form 61I) in a manner that could reasonably be expected to have come to their attention,

(i) at least forty-five days before leave is sought, or

(ii) where special circumstances justify the issue of a writ of possession within a shorter period, within such shorter period as the court considers just.

COMMENTS

61.09(1)

- Part of Williston 61.06(1). Reference to "unless otherwise provided in the judgment" has been deleted. Where a party wishes to obtain the leave at the same time as the order for possession, the motion can be made at the trial or hearing giving rise to the order for possession.

61.09(2)

- Williston 61.06(1), part, L.R.

- The provision is split into clauses to make it clear that a party need receive no notice of the proceeding or the motion for a writ other than what he would get as a party. A party in default would get no notice at all after the statement of claim.

- Persons other than parties - especially tenants of mortgaged premises - must be given a separate notice. Present subrule 567(2) was added in an attempt to insure that tenants were not suddenly evicted under a writ issued in a case they knew nothing about. Though laudable in principle, the present rule result in practice in tenants being thrown out of their homes on as little as seven days' notice. That is clearly an unrealistic amount of time to find new accommodation in today's rental market. For this reason, the Working Group proposes a minimum forty-five day notice period for non-parties. The notice could be given before the

WILLISTON'S PROPOSED RULES

61.09

61.06 Writ of Possession

(1) *Where Leave is Required*

Unless otherwise provided by the judgment, a Writ of Possession shall not be issued without leave of the court, which may be obtained on a motion made without notice, but such leave shall not be given unless it is shown by affidavit that all persons in actual possession of the whole or any part of the real property have received sufficient notice of the proceeding in which such judgment was obtained to have enabled them to apply to the court for relief.

order is obtained so as not to delay the obtaining of possession by the mortgagee. The form contemplated by the Working Group would give a clear warning to the tenant (or other occupant) that the mortgagee was suing the owner (landlord), that he was claiming possession and that the result could be eviction of the tenant in forty-five days' time without any further notice. Clause (b) is also drafted so that the mortgagee could give the notice in a manner that is effective and yet does not comply with the service rules in Rule 18 (for example, sliding the notice under the door of every unit and posting it in the lobby).

- The Working Group discussed this proposal with Master Dunn. He is opposed to any minimum notice period on the group that this is yet another expensive roadblock for mortgage lenders, who all too often are going for private power of sale proceedings now to avoid the courts. The question is one of balancing the interests of mortgagees and the interests of tenants.

- The reference in Williston to affidavit evidence on the motion for leave has been deleted because the motion could be made at trial on the basis of oral evidence or could be based in part on the sheriff's certificate of service of notice on the tenants.

- Courts Administration suggested that present R. 567(3) be reinserted to avoid "possible abuse of writs of possession". Working Group. What is the abuse? Should the rule be reinserted?

Duration

(3) A writ of possession remains in force for one year from the date of the order authorizing its issue, and where the writ is filed with a sheriff, no notice of its expiration need be given by him.

61.06 (2) *Duration*
A Writ of Possession remains in force for one year from the date of the judgment or order authorizing its issue, and where the Writ is filed with a sheriff, no notice of its expiration need be given by him.

Revised Rules of Civil Procedure

CONTEMPT ORDER

Where order may be made

61.10(1) A contempt order to enforce an order requiring any person to do any act, other than the payment of money, or to abstain from doing any act, may be made by a judge [on his own initiative] or on motion by a party, on notice to the person against whom the order is sought.

Comments

CONTEMPT ORDER

61.10

- The contempt order rule has been substantially reorganized and redrafted, though the changes are mainly as to form. The major changes are:
  - to spell out here when orders may be obtained and how
  - to describe the potential terms of the order
  - to provide more specifically for variation of the order

61.10(1)

- New. Cf. Williston 61.04(1).
- B. Doran suggested deleting the reference to "on the motion of a party" because a court may wish to initiate contempt proceedings itself. Working Group. We suggest the better solution is to add that the court may do so on its own motion, because the rule should say how a party does it.
- "Notice to the party" changed to "notice to the person" to acknowledge that the contemnor may be a non-party.

Williston's Proposed Rules

61.04 **Enforcement of Judgment to Do or Abstain from Doing any Act**

(1) A judgment requiring any party to do any act, other than the payment of money, or to abstain from doing any act, may be enforced against the party refusing or neglecting to obey the judgment by a contempt order made by a judge on the motion of any party entitled to enforce obedience to the judgment and on notice to the party against whom the order is sought.

(2) A contempt order shall not be granted unless the judge is satisfied that the [party] required by the order to do or abstain from doing any act had actual knowledge of the substance of the order [before the expiration of the time limited by the order, if any, for the doing or abstaining from the act.]

Content of Order

(3) In a contempt order, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if he fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing any act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 61.08 against his property.

61.10(2)

- Working Group. We suggest bracketed words be deleted because otherwise it would be a complete answer to the contempt proceeding that the person found out the 11th day when he was ordered to do it within 10 days, even though he has still failed to do it.

61.10(3)

- New. Cf. Williston 61.11(1) - (3) and (7). Modelled after the provision added in New Brunswick rules (in place of Williston 61.11) Williston 61.11 unduly emphasized imprisonment as the primary enforcement method - this list seems to provide a realistic range of alternatives.

61.04 (2) A contempt order shall not be granted unless the judge is satisfied that the party required by the judgment to do, or abstain from doing any act had actual knowledge of the substance of the judgment before the expiration of the time limited by the judgment, if any, for the doing or abstaining from the act.

61.11 Enforcement of Contempt Order

(1) A contempt order may be enforced by the issuance of a Warrant for Committal (Form 61F) directed to all sheriffs and other peace officers in the Province of Ontario to apprehend the person against whom the contempt order has been issued and to detain him in custody until he can be brought before the court.

(2) Where a person is apprehended or detained in custody under a Warrant for Committal, without obeying the judgment; then, upon the return of the sheriff that the person has been so apprehended or detained, the party seeking to enforce the judgment is entitled to apply to a judge for a Writ of Sequestration (Form 61G) against the property of the disobedient person.

(3) If a Warrant for Committal cannot be executed against the person refusing or neglecting to obey the judgment by reason of his being out of the jurisdiction of the court or his having absconded or that, with due diligence, he cannot be found or, if for any other reason a judge is satisfied that a Warrant for Committal ought to be dispensed with, leave may be granted for the issuance of a Writ of Sequestration against the property of the disobedient person.

(7) Any person or corporation disobeying a judgment or a contempt order is liable to be fined in lieu of or in addition to having a contempt order enforced against him.

Williston 61.04(3)

- Working Group suggests this subrule be deleted. It covers what is a typical term included in an order made on a contempt motion, but the rule seems to suggest that the judgment is amended, rather than expressing this term in the order.

61.04 (3) Where the judgment does not specify any time within which the act is to be done or abstained from, a judge may fix the time within which compliance is to be required.

Where Corporation is in Contempt

(4) Where a corporation is in contempt, the judge may also make an order under subrule (3) against any officer or director of the corporation and may grant leave to issue a writ of sequestration under rule 61.08 against his property.

61.10(4)

- Cf. Williston 61.11(6). Is anything lost by the omission of the phrase "wilfully disobeyed".

61.11 (6) Where any judgment against a corporation is wilfully disobeyed, it may be enforced by a Writ of Sequestration against the corporation or by a Warrant for Committal against the directors or officers of the corporation.

Warrant of Committal

(5) An order under subrule (3) for imprisonment may be enforced by the issue of a warrant of committal (Form 61J) requiring that the person be apprehended, brought before the court and dealt with as a judge directs.

61.10(5)

- Cf. Williston 61.11(1).

61.11 Enforcement of Contempt Order

(1) A contempt order may be enforced by the issuance of a Warrant for Committal (Form 61F) directed to all sheriffs and other peace officers in the Province of Ontario to apprehend the person against whom the contempt order has been issued and to detain him in custody until he can be brought before the court.

Variation of Contempt Order

(6) On motion of a person against whom a contempt order has been made, a judge may

(a) vary the contempt order;

(b) limit the imprisonment or discharge the person;

(c) give directions in respect of any property held under a writ of sequestration or discharge the writ, and

(d) grant such other relief and make such other order as is just.

61.10(6)

- Modelled on New Brunswick. Cf. Williston 61.11(5). Should the power to vary be limited to situations where the person is imprisoned (as is the case under Williston 61.11(5))?

(5) Where it is made to appear that any person committed for contempt is in actual custody, a judge may grant him such relief as in the nature and circumstances may seem just, but any relief that may be granted to any such person does not relieve him for any civil liability.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
Order that Act be done by another person (7) Where a person fails to comply with an order requiring him to do any act, other than the payment of money, a judge on motion may, instead of or in addition to making a contempt order, order the act to be done at the expense of the disobedient person by the party enforcing the order or any other person appointed by the judge. (8) The party enforcing the order and any person appointed by the judge are entitled to their assessed costs of the motion under subrule (7) and of doing the act ordered to be done, including any disbursements reasonably incurred.	61.10(7) & (8) - Williston 61.11(8).	(8) Where any person refuses or neglects to comply with a judgment requiring him to do any act, other than the payment of money, or to abstain from doing any act, a judge may, instead of, or in addition to, granting a contempt order, order the act to be done at the expense of the disobedient party by the party who obtained the order or any other person appointed by the judge; and, upon the act being done and the expense thereof ascertained, a Writ of Seizure and Sale may issue against the disobedient party for the amount so ascertained and costs.

ENFORCEMENT OF FINE OR RECOGNIZANCE

61.11(1) A fine, bond or recognizance may be enforced by writ of seizure and sale or writ of sequestration issued by leave of a judge on motion by the Attorney General or any other person entitled to enforcement.

(2) The sheriff to whom a writ obtained under subrule (1) is directed shall proceed immediately to carry out the writ without a direction to levy and shall forthwith pay any money realized to the Treasurer of Ontario or other person entitled to it.

61.11

- This provision is entirely new. It is required because of the proposal to repeal the Estreats Act. That Act now provides the procedure for enforcement of fines, bonds and recognizances in civil matters. The Criminal Code and the Provincial Offences Act contain their own procedures for proceedings governed by those Acts.

61.12

61.12 and 61.13

- cf. Williston 61.09 Return by Sheriff Working Group. We feel that this Williston rule could probably be made much clearer. It really seems to deal with two quite different subjects (a) the sheriff reporting the result of his execution to the judgment creditor or the court, if requested; and (b) the removal of fully executed expired and withdrawn writs from his files. We propose that in the revised rules these steps be dealt with in two rules
  - 61.12 Sheriffs Report as to Execution of Writ
  - 61.13 Removal of Writ from Sheriff's File

SHERIFF'S REPORT AS TO EXECUTION OF WRIT

61.12(1) A party or his solicitor who has filed a writ with a sheriff may require the sheriff by a request in writing to report the manner in which he has executed the writ and the sheriff shall do so forthwith by mailing to the party or solicitor a sheriff's report (Form 61K).

61.12(1)

- Williston 61.09(4) and (6) L.R. Courts Administration objected to Williston 61.09(4) in that it would permit a corporation to give instructions to a sheriff. Working Group. Why not?

61.09(4) Any party or his solicitor who has filed a Writ with a sheriff may require the sheriff by a demand in writing to report the manner in which he has executed the Writ.

(6) Where a sheriff is required to make a report to the court with respect to any Writ filed with him, he shall forthwith file in the office from which the order was issued his Certificate (Form 61E) as to the manner in which he has executed the Writ.

(2) Where the sheriff fails to comply within a reasonable time with a request made under subrule (1), the party serving the request may move before [a judge] for an order directing the sheriff to comply with the request.

61.12(2)

- Williston 61.09(5) L.R.

(5) Where the sheriff fails to comply with a demand made under the preceding paragraph, within a reasonable time, the party serving the demand may apply to a judge for an order directing the sheriff to comply with such demand.

REVISED RULES OF CIVIL PROCEDURE

REMOVAL OF WRIT FROM SHERIFF'S FILE

61.13(1) When a writ has been fully executed or has expired, the sheriff shall endorse a memorandum to that effect on the writ and remove it from his file.

(2) When a writ is withdrawn, the sheriff shall record the date and hour of the withdrawal and endorse a memorandum to that effect on the writ and return it to the party who filed it or his solicitor.

COMMENTS

61.13(1)

- Williston 61.09(1), L.R. Working Group. Williston required the executed or expired writ to be returned to the registrar's office (as does R. 553(2)). Courts Administration pointed out that the timing of this return of the expired writ creates a problem because the registrar's office sends files to storage five years after judgment, whereas the writ is good for six years which means files have to be recalled from storage just to file the returned writ. Is there really any need to send the expired or executed writ to the registrar's office? Would it not be sufficient to simply have the registrar remove it from his files and keep a record of what he has done

61.13(2)

- Williston 61.09(3), L.R.

WILLISTON'S PROPOSED RULES

61.09 Return by Sheriff

(1) When a Writ has been executed or has expired, the sheriff shall endorse a memorandum to that effect on the Writ and return it to the office from which it was issued.

(2) The registrar to whom a Writ is returned shall endorse thereon the day and hour when it was returned to his office.

(3) Where a Writ has been withdrawn, the sheriff shall record the day and hour of such withdrawal and endorse a memorandum to that effect on the Writ and return it to the party who filed it or to his solicitor.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
DUTY OF PERSON FILING WRIT WITH SHERIFF 61.14(1) Where a writ of seizure and sale has been filed with a sheriff and any payment has been received by or on behalf of the execution creditor, the creditor shall forthwith give the sheriff notice of the payment. (2) Where an order has been satisfied in full, the execution creditor shall withdraw all writs of execution from the office of any sheriff with whom they have been filed.	61.14(1) - New. Added at suggestion of Courts Administration. 61.14(2) - New. Added by Working Group as a result of a suggestion by Rick Peterson. Is it a useful provision?	

REVISED RULES OF CIVIL PROCEDURE

EXAMINATION IN AID OF EXECUTION

Examination of Execution Debtor

61.15(1) An execution creditor may, without an order, examine the execution debtor as to,

(a) his assets and income;

(b) the means he had when the debt or liability in respect of which the order was obtained against him was incurred or, in the case of an order for costs only, at the time of the commencement of the proceeding;

(c) the means he still has of discharging the order;

(d) the disposal he has made of any property since contracting the debt or incurring the liability or, in the case of an order for costs only, since the commencement of the proceeding; and

(e) what debts are owing to him.

COMMENTS

61.15

- Should the examination be available where the order sought to be enforced is interim (eg. to pay money or the deliver goods)? Should it be available where the relief granted is non-monetary? The B.C. rules allow both i.e. the examination may be had in aid of the execution of any order.

61.15(1)

- Williston 61.10(1)(a), L.R. Working Group. The Williston provisions as to the scope of the examination are cumbersome and difficult to follow (they are closely modelled after present R.587(1)). The following provision (from B.C.) seems much clearer and we suggest it be incorporated:

Examination of Debtor

(1) Where a judgment creditor is entitled to issue execution upon or otherwise enforce an order of the Court, he may examine the judgment debtor ~~for discovery~~ as to

(a) any matter pertinent to the enforcement of the order,
(b) the reason for nonpayment or nonperformance of the order,
(c) the income and property of the debtor,
(d) the debts owed to and by the debtor,
(e) the disposal the debtor has made of any property either before or after the making of the order,
(f) the means the debtor has, or has had, or in future may have, of satisfying the order,
(g) whether the debtor intends to obey the order or has any reason for not doing so. (MR 610; ER 48/1.)

WILLISTON'S PROPOSED RULES

61.10 Examination in Aid of Execution

(1) *Examination of Judgment Debtor*

(a) A judgment creditor may, without an order, examine the judgmeot debtor as to,

(i) his assets and income;

(ii) the means he had wheo the debt or liability in respect of which judgment has been obtained against him was incurred or, in the case of a judgment for costs only, at the time of the commencement of the proceedings;

(iii) the means he still has of discharging the judgment;

(iv) the disposal he has made of any property since contracting such debt or incurring such liability or, in the case of a judgment for costs only, since the commencement of the proceeding; and

(v) any and what debts are owing to him.

REVISED RULES OF CIVIL PROCEDURE

(2) Where the order is against a corporation, the execution creditor may, without an order, examine any officer or director of the corporation as to,

(a) the names and addresses of the shareholders of the corporation;

(b) the amount and particulars of the shares held or owned by each shareholder, and the amount paid thereon;

(c) what debts are owing to the corporation;

(d) the assets and income of the corporation; and

(e) the disposal made by it of any property since contracting the debt or incurring the liability in respect of which the order was obtained or, in the case of an order for costs only, since the commencement of the proceeding.

(3) A person examined under subrule (1) or (2) shall not be further examined in the same proceeding for a year, unless the court orders otherwise.

COMMENTS

61.15(2)

- Williston 61.10(1)(b). Working Group. Again we feel the B.C. approach is simpler (and more comprehensive in that it also deals with partnerships and sole proprietors):

Examination of Corporate, Partnership, or Firm Debtor

(2) An officer or director of a corporate judgment debtor, or a person liable to execution upon the order in the case of a partnership or firm judgment debtor, may, without an order, be examined for discovery upon the matters set out in subrule (1). (MR 610; ER 48/1.)

- In any event, what is the purpose of revised rule 61.15(2)(a)?

61.15(3)

- Williston 61.10(1)(c), redrafted.

WILLISTON'S PROPOSED RULES

(b) Where the judgment is against a corporation, the judgment creditor may, without an order, examine any officer or director of the corporation as to,

(i) the names and addresses of the shareholders of the corporation;

(ii) the amount and particulars of the shares held or owned by each shareholder, and the amount paid thereon;

(iii) any and what debts are owing to the corporation;

(iv) the assets and income of the corporation;

(v) the disposal made by it of any property since contracting the debt or incurring the liability in respect of which the judgment was obtained or, in the case of a judgment for costs only, since the commencement of the proceeding.

(c) No further examination shall be had without an order until the expiration of one year from the completion of the preceding examination.

Revised Rules of Civil Procedure

Examination of Any Other Person

(4) The court may order any person to whom the debtor has made a transfer of property exigible under execution since the date when the debt or liability in respect of which the order was obtained was contracted or incurred, or, where the order is for costs only, since the commencement of the proceeding, to submit to being examined as to,

(a) the disposal the debtor has made of any property since contracting the debt or incurring the liability; and

(b) what debts are owing to the debtor.

(5) Where the court is satisfied that there is reasonable ground for believing that a person is in possession of property of the execution debtor exigible under execution, it may order the person or, where the person is a corporation, any officer or director of the corporation to submit to examination as to the assets and income of the execution debtor.

(6) Where any difficulty arises about the enforcement of an order, the court may make such order for the examination of any other person as is just.

General

(7) Rule 33 applies to the examination of any person liable to be examined under this rule, unless otherwise ordered or provided by this rule.

Comments

61.15(4)-(6)

- Williston 61.10(2), L.R. Working Group. Is the following shorter and more general B.C. provision preferable:

Examination of Person Other Than Debtor

(4) Upon being satisfied that any other person may have knowledge of the matters set out in subrule (1) the Court may order him to be examined for discovery concerning his knowledge. (MR 610.)

61.15(7)

- Williston 61.10(3).

Williston's Proposed Rules

(2) *Examination of Any Other Person*

(a) The court may order any person to whom the debtor has made a transfer of his property, exigible under execution, since the date when the debt or liability in respect of which judgment has been obtained or incurred, or, where the judgment is for costs only, since the commencement of the proceeding, to submit to being examined as to,

(i) the disposal the debtor has made of any property since contracting the debt or incurring the liability; and

(ii) any and what debts are owing to the debtor.

(b) Where the court is satisfied that there is reasonable ground for believing that a person or corporation is in possession of any property of the judgment debtor, exigible under execution, it may order such person or any officer of the corporation to submit to examination as to the assets and income of the judgment debtor.

(c) Where any difficulty arises in or about the enforcement of any judgment, the court may make such order for the examination of any other person as may seem just.

(3) Unless otherwise ordered or provided by this rule, the procedure prescribed by Rule 33 shall apply to the examination of any person liable to be examined under this rule.

Revised Rules of Civil Procedure

(8) Where an execution debtor,

(a) neglects or refuses to attend for an examination under this rule;

(b) attends and refuses to disclose his property or his transactions;

(c) does not make satisfactory answers respecting his property or his transactions; or

(d) has concealed or disposed of his property in order to defraud his creditors,

a judge may order him to be committed for contempt.

(9) Where any other person liable to be examined under this rule,

(a) neglects or refuses to attend for his examination; or

(b) attends and refuses to disclose any of the matters in respect of which he may be examined,

a judge may order him to be committed for contempt.

Comments

61.15(8)

- Williston 61.10(4), L.R. and subclaused.

61.15(9)

- Williston 61.10(5), L.R. and subclaused.
- The B.C. rules contain the following provision as part of the examination in aid of execution rule.

Use of Examination

(7) Any part of an examination ~~for discovery~~ under this rule may be given in evidence in the same or any subsequent proceeding between the parties to the proceeding or between the judgment creditor and the person examined for discovery. *(New.)*

- The purpose of the provision seems reasonably clear: if there are subsequent proceedings (eg. to set aside fraudulent conveyances) the J.D. examination can be used like an examination for discovery. Note

(cont'd)

Williston's Proposed Rules

(4) Where a judgment debtor neglects or refuses to attend for an examination under this rule or, where he attends and refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same or, if it appears from such examination that he concealed or disposed of his property in order to defraud his creditors or any of them, a judge may commit him for contempt.

(5) Where an officer of a corporation or any other person liable to be examined under this rule neglects or refuses to attend for his examination or attends and refuses to disclose any of the matters in respect of which he may be examined, a judge may order him to be committed for contempt.

Costs of Examination

(10) The party conducting an examination under this rule is entitled without order to his assessed costs of the examination from the execution debtor, unless the court orders otherwise.

that revised rule 32.11 Use of Discovery at Trial applies only to examinations for discovery and would not catch a J.D. examination. Do we need a provision similar to the B.C. rule (in this content what about the use of trial of examinations of a party that are not examinations for discovery) (eg. cross-examinations on affidavits, or examinations as a witness on a pending motion). If the party makes admissions on the examination should not the opposing party be allowed to read them in in the same way as discovery? Do we need a rule similar to revised rule 32.11 to deal with this, or is it taken care of by the common law re admissions plus section 48 of the Evidence Act viz:

Admissibility of copies of depositions

48. Where an examination or deposition of a party or witness has been taken before a judge or other officer or person appointed to take it, copies of it, certified under the hand of the judge, officer or other person taking it, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R.S.O. 1970, c. 151, s. 48.

61.15(10)

- New, taken from B.C. rules. (This would "plug into" rule 61.01(2).)

REVISED RULES OF CIVIL PROCEDURE

RULE 62 APPEALS TO AN APPELLATE COURT

APPLICATION OF RULE

62.01(1) Rule 62.02 to 62.15 apply to all appeals to an appellate court, including a proceeding in an appellate court by way of stated case under a statute or a special case under rule 24.04, except as provided in subrule (2).

(2) In an appeal to the Divisional Court from an interlocutory order of a judge or local judge of the Supreme Court with leave, rule 63.03 applies.

COMMENTS

RULE 62 APPEALS TO AN APPELLATE COURT

62.01

- New, but compare W. 62.01(1). Williston was not altogether clear on this issue.

- Reference to a motion for a new trial (see W. 62.01(1)) deleted at the suggestion of J. Morden on the ground that today the power to order a new trial is simply a remedy which may be granted on a successful appeal. (Note, however, that present J.A. s.28(3) appears to treat the jurisdiction re new trials as something quite distinct from the appellate jurisdiction). The Working Group agrees with J. Morden's suggestion. The similar reference is in J.A. s.15(1) and 24(5) to motions for a new trial should also be deleted.

- Reference to an application by way of stated case (which appears in present R.497b(1)) reinserted as suggestion of J. Morden. Since some statutes do provide for tribunals stating a case for the Court of Appeal.

- Reference to a special case under R.24.04 also added. Would this be better included in R.24.04 itself?

Non Trial Judgment Appeals

- J. Morden made the point that W. Rule 62 was cast in a form which assumed that all appeals were from judgments after trial where evidence had been adduced through witnesses. The Working Group has redrafted the rule at various points to remedy this.

WILLISTON'S PROPOSED RULES

62.01

RULE 62 APPEALS TO AN APPELLATE COURT

62.01 Commencement of Appeals

(1) Unless otherwise provided by any statute, or by these rules, an appeal to an appellate court, including a motion for a new trial, shall be made by Notice of Appeal (Form 62A) served upon all parties whose interests are sought to be affected by the appeal, within 30 days after the date of the judgment appealed from.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.02
INTERPRETATION 62.02(1) In rules 62.03 to 62.15, "Registrar" means the Registrar of the Court of Appeal or Divisional Court, as the case may be, or the Registrar of the Supreme Court.	62.02(1) - New. Each of the appellate courts now has its own Registrar. The Registrar of the Supreme Court is included because he in fact acts as registrar of either Court in the absence of the actual registrar (Could not this latter aspect be better taken care of elsewhere i.e. in the Act?)	
(2) Where a party to an appeal acts in person, anything required or permitted by rule 62.03 to 62.15 to be done by a solicitor shall be done by the party.	62.02(2) - New. Added by Working Group to make the rules applicable and complete in situations where a litigant acts in person.	
COMMENCEMENT OF APPEALS *Time for Appeal* 62.03(1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 62A) on all parties whose interests are affected by the appeal, within thirty days after the date of the order appealed from, unless otherwise provided by statute.	62.03(1) - W. 62.01(1), redrafted. Sub-heading added.	62.01 Commencement of Appeals (1) Unless otherwise provided by any statute, or by these rules, an appeal to an appellate court, including a motion for a new trial, shall be made by Notice of Appeal (Form 62A) served upon all parties whose interests are sought to be affected by the appeal, within 30 days after the date of the judgment appealed from.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.03
(2) The time for appeal in a divorce action is prescribed by section 17 of the Divorce Act (Canada).	62.03(2) - Williston, note to 62.01. Is incorporating this provision into the rule preferrable to making it a note?	*Note: In divorce proceedings, the time for appeal is prescribed by s. 17 of the Divorce Act (Canada) 1967-68, c. 24.*
Notice of Appeal (3) The notice of appeal (Form 62A) shall state the relief sought and shall set out the grounds of appeal.	62.03(3) - W. 62.01(2), L.R.	62.01 (2) The Notice of Appeal shall state the relief sought and shall set forth the grounds of appeal.
(4) The notice of appeal, with proof of service, shall be filed in the office of the Registrar within ten days after service.	62.03(4) - part of W. 62.01(3). - Present Rule 497a permits papers for Divisional Court proceedings to be filed in the offices of local registrars. Williston did not incorporate this provision re appeals - all such documents must be filed in Toronto. Is this O.K.? Is the right to file by mail (W.4.08) sufficient? (It is not clear whether under Williston papers relating to proceedings for Judicial Review may be filed locally - see R.69 and W. 16.01).	62.01 (3) The appeal shall be set down for hearing by filing in the office of the Registrar the Notice of Appeal, with proof of service, within 10 days after such service. At the same time, there shall be left with the Registrar either proof that copies of the evidence required for use upon the appeal have been ordered, or an undertaking by the appellant or his solicitor to order the evidence not agreed to be omitted within 30 days after the filing of the Notice of Appeal. Proof that the evidence has been ordered in compliance with such undertaking shall be filed within 5 days of the time it is so ordered.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

WILLISTON'S PROPOSED RULES

62.04

62.04

Under Williston the provisions relating to agreements as to evidence and the ordering of evidence and proof that the evidence had been ordered, were dealt with in two different places (62.01(3) and 62.05). For clarity these provisions have all been gathered together in one rule and placed immediately after the rule dealing with the commencement of appeals. To avoid any confusion the terms "documentary evidence" and "oral evidence" have been used.

CERTIFICATE OR AGREEMENT AS TO EVIDENCE

Appellant's Certificate as to Evidence

62.04(1) In order to minimize the reproduction of documentary evidence and the transcription of oral evidence for use on the appeal, the appellant shall serve with the notice of appeal an appellant's certificate as to evidence (Form 62B) setting out those portions of the evidence that, in his opinion, are not required for the appeal.

62.04(1)

- W. 62.05(1), L.R. The certificate has been given a more informative and descriptive title.

62.05 Certificate of Appellant and Respondent or Agreement

(1) In order to minimize, where possible, the reproduction of exhibits and the transcription of evidence for use on an appeal, the appellant shall serve on each respondent, together with the Notice of Appeal, a Certificate of Appellant (Form 62E) setting forth those exhibits or parts thereof (by number) and of the evidence (by witness) that he suggests are not required for the appeal.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.04
Respondent's Certificate as to Evidence (2) A respondent shall serve on the appellant a respondent's certificate as to evidence (Form 62C), either confirming the appellant's certificate or setting out any additions to or deletions from it, within fifteen days after service of the appellant's certificate.	62.04(2) & (3) - W. 62.05(2), sub-ruled and L.R.	62.05 (2) Within 15 days after receipt of the Certificate of Appellant, a respondent shall serve on the appellant a Certificate of Respondent (Form 62F) either confirming the Certificate of Appellant or setting out any additions to, or deletions therefrom. A respondent who fails to do so within the time prescribed shall be deemed to confirm the Certificate of Appellant.
(3) A respondent who fails to serve a respondent's certificate within the prescribed time shall be deemed to confirm the appellant's certificate.		
Agreement as to Evidence (4) Instead of complying with subrules (1) to (3), the parties may file an agreement as to the documentary evidence to be included in the appeal books and the oral evidence to be transcribed.	62.04(4) - W. 62.05(3), L.R. "Agreement as to documentary evidence to be included in the appeal books" has been used instead of "agreement as to the content of the appeal books" since the latter term is hardly accurate. Revised Rule 62.08 prescribes the contents of appeal books and, apart from documentary exhibits and affidavit evidence, the requirements are mandatory and not subject to agreement.	62.05(3) In lieu of complying with paragraph (1) of this subrule, the parties may file an agreement as to contents of the Appeal Books and the evidence to be transcribed.

REVISED RULES OF CIVIL PROCEDURE

Ordering Transcripts

(5) Not later than thirty days after filing the notice of appeal the appellant shall

(a) subject to any direction under rule 62.07(4), order in writing a transcript of all oral evidence that the parties have not agreed to omit, and

(b) file proof that he has ordered the transcript.

(6) Where a party (?) has [previously] ordered a transcript of all the oral evidence, he shall forthwith modify his order in writing to comply with the certificates or agreement.

(7) When the evidence has been transcribed, the court reporter shall forthwith notify all parties and the Registrar.

COMMENTS

62.04(5)

- part of W. 62.01(3) and 62.05(4), revised. The Working Group felt there were two problems with Williston 62.01(3) - it was unduly complicated and it was too remote from, and made no reference to, the requirements with regard to certificates and agreements.

- the cross-reference to Revised Rule 62.07(4) (there is a similar cross-reference today in R.498a(3)) which was omitted in Williston, has been added.

62.04(6)

- part of W. 62.05(4). Should the bracketed word be included?

62.04(7)

- W. 62.05(5). J. Morden suggested that the following words be added: (the court reporter) "shall state at the end of the transcript the date upon which it was ordered, completed and the appellant was notified of the completion". Working Group agrees it should be included but would it be better placed in Rule 4.06 re transcripts?

WILLISTON'S PROPOSED RULES

62.04

62.01 (3) The appeal shall be set down for hearing by filing in the office of the Registrar the Notice of Appeal, with proof of service, within 10 days after such service. At the same time, there shall be left with the Registrar either proof that copies of the evidence required for use upon the appeal have been ordered, or an undertaking by the appellant or his solicitor to order the evidence not agreed to be omitted within 30 days after the filing of the Notice of Appeal Proof that the evidence has been ordered in compliance with such undertaking shall be filed within 5 days of the time it is so ordered.

62.05(4) Upon being served with a Certificate of Respondent by each respondent or after the time for such service has expired, or upon the filing of an agreement as to the contents of the appeal book and the evidence to be transcribed, the appellant shall order in writing all the evidence that has not been agreed to be omitted. [Where the party has ordered all the evidence, he shall forthwith modify such order in writing to comply with the certificates or agreement.]

62.05(5) When the evidence has been transcribed, the court reporter shall forthwith notify all parties and the Registrar.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.04
Costs Sanctions (8) The court may impose costs sanctions where unnecessary evidence was transcribed or reproduced.	62.04(8) - W. 62.05(6).	62.05 (6) The court may impose cost sanctions where unnecessary evidence or exhibits were transcribed or reproduced.
CROSS-APPEALS 62.05 Where a respondent seeks to set aside or vary the order appealed from, he may, within fifteen days after the notice of appeal has been served on him, serve a notice of cross-appeal (Form 62D) on all parties whose interests are affected, and file it, with proof of service, within five days after service.	62.05 - W. 62.03, L.R. "Set - aside" added at the suggestion of J. Morden.	62.03 Cross-Appeals Where a respondent intends to contend that the judgment appealed against should be varied, he may, within 15 days after a Notice of Appeal has been served upon him, serve a Notice of Cross-Appeal (Form 62C) upon all parties whose interests are sought to be affected, and file such notice, with proof of service, within 5 days after service.

REVISED RULES OF CIVIL PROCEDURE

AMENDMENT OF NOTICE OF APPEAL OR CROSS-APPEAL

62.06(1) The notice of appeal or cross-appeal may be amended, without leave, by serving on each of the parties on whom the notice was served a supplementary notice of appeal or cross-appeal (Form 62E) and filing it with proof of service before the appeal is perfected.

(2) No cross-appeal may be heard where the respondent has not delivered a notice of cross-appeal and no grounds other than those stated in the notice of appeal or cross-appeal or any supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal.

COMMENTS

62.06

- W. 62.02, extended to include cross appeals also.

Williston 62.04

- Deleted at the suggestion of J. Morden on the ground that it merely gives the appellant early notice of the respondents position which will in any event be made apparent in the latters factum.

WILLISTON'S PROPOSED RULES

62.06

62.02 **Amendment of Grounds of Appeal**

(1) The Notice of Appeal may be amended, without leave, by the appellant serving on each of the parties on whom the Notice of Appeal was served a Supplementary Notice of Appeal (Form 62B) and by filing it with proof of service before the appeal is perfected.

(2) Except with the leave of the court hearing the appeal, no grounds other than those stated in the Notice of Appeal or any Supplementary Notice may be relied upon by the appellant at the hearing.

62.04 **Respondent's Notice of Contention**

(1) A respondent who has not cross-appealed but who intends to contend on the appeal that,

(a) the judgment appealed from should be affirmed on grounds other than those given by the court appealed from; or

(b) in the event that the appeal is allowed in whole or in part, he is entitled to other or different relief or disposition than that given by the judgment appealed from,

shall within 15 days from the service of the Notice of Appeal serve on the appellant and any other party whose interests may be affected thereby and within 5 days thereafter file with the Registrar, with proof of service, a Notice of Contention (Form 62D) specifying the grounds thereof.

REVISED RULES OF CIVIL PROCEDURE

PERFECTING APPEALS

Time for Perfecting

62.07(1) The appellant shall perfect the appeal by complying with subrules (2) and (3),

(a) where no transcript of evidence is required for the appeal, within thirty days after filing of the notice of appeal; or

(b) where a trasncript of evidence is required for the appeal, within thirty days after receiving notice that the evidence has been transcribed.

Record and Exhibits

(2) The appellant shall cause to be forwarded to the registrar [insofar as they are relevant to the appeal,] the record and the original exhibits from the court or tribunal from which the appeal is taken.

COMMENTS

62.07

This rule (W. 62.06) has been substantially re-organized to make it clearer and more intelligible and particularly to pick up J. Morden and A. Bridges' comment that the Williston rule assumed that all appeals came from trial judgments at which oral evidence was received.

62.07(1) - (3)

- Williston 62.06(1) and (3) divided into 3 sub-rules, headings added and redrafted.

62.07(1)(a)

- Should this time run from the date of service of the notice of appeal or from the date of its filing?

62.07(1)(b)

- At J. Morden's suggestion the point at which time starts to run has been changed to date upon which the appellant received notice that the evidence has been transcribed.

- The time has been extented by Working Group to 30 days (from 15) to allow the appellant a reasonable time in which to prepare his factum.

62.07(2)

- As A. Bridges pointed out W. 62.06 (1) was too narrow on this point since the appeal might be from a tribunal (or a non-trail court).

- J. Morden suggested the bracketed language. Should it be included?

WILLISTON'S PROPOSED RULES

62.07

62.06 **Perfecting Appeals**

(1) The appellant shall, within 30 days after filing the Notice of Appeal, or within 15 days after the evidence has been transcribed, whichever is later, cause to be forwarded to the Registrar the trial record and the original exhibits and shall file with the Registrar the certificates or agreement referred to in Rule 62.05 and shall deposit with the Registrar in the case of an appeal to the Court of Appeal five copies and, in the case of an appeal to the Divisional Court, three copies of the following:

(a) the appeal books;

(b) the evidence; and

(c) the Appellant's Statement.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.07
Material to be Filed (3) The appellant shall file with the Registrar, (a) the certificates or agreement as to evidence referred to in rule 62.04; (b) in the Court of Appeal, five copies, or in the Divisional Court, three copies, of (i) the appeal book referred to in rule 62.08; (ii) the transcript of evidence; and (iii) the appellant's factum referred to in rule 62.09; (c) proof of service on all other parties to the appeal of the material referred to in clause (b); and (d) a certificate [of perfection] stating that all the material required for the appeal has been filed and setting out the name and address for service of every person entitled to notice of the hearing of the appeal.	62.07(3) - At J. Morden's suggestion: (a) "deposited with" has been changed to "filed" and (b) appellants "statement" has been changed to "factum". - 62.07(3)(d) is new. It was added by the Working Group in response to A. Bridges' comments. He points out that (a) it is often difficult for him to determine from the file whether all the necessary material has in fact been filed and (b) it is not always easy for him to determine who is entitled to notice of the hearing of the appeal (since in appeals from administrative tribunals often the A.G. or the Ministry is entitled to notice of the hearing even though not a party to the appeal). The Working Group proposes that it be the responsibility of the appellant to file a certificate as to these matters (which will be the basis on which the registrar will notify parties etc. under 62.07(5)). - Would the addition of the bracketed words "of perfection" be useful? Should a form be provided?	

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.07
Relief from Compliance (4) Where compliance with the rules as to the appeal books or transcripts of evidence would cause undue expense or delay, a judge of the appellate court may give special directions.	62.07(4) - W. 62.06(2), L.R.	62.06 (2) Where compliance with the rules as to the appeal books or transcripts of evidence would cause undue expense or delay, a judge of the appropriate appellate court may give special directions.
Registrar to Notify (5) When the appeal has been perfected, the Registrar shall mail a notice [of perfection] to every person mentioned in the appellant's certificate under clause (3)(d) setting out the date on which the appeal was perfected and the list on which the appeal has been placed.	62.07(5) - New, compare W. 62.06(3)(a). The Williston provision required the appellant to serve and file a notice of the date upon which the appeal was perfected which was a pre-condition to the appeal being placed on a list. A difficulty with this approach is that an appellant could delay the whole proceeding by failing to give this notice and this was not really dealt with in W. 62.10 Failure to Perfect Appeal. Today it is the Registrar's responsibility to notify the parties of the date upon which the appeal is perfected. The Working Group proposes that, as provided in revised rule 62.07 (5), this should continued to be the responsibility of the Registrar. It would also be useful and informative if the Registrar were to include in the notice on which list he has placed the appeal. (Should the rule be moved down to follow revised sub-rule (8)?) - Should the bracketed words "of perfection" be added? Should a form be included?	62.06 (3) As soon as the record, exhibits and the certificates or agreement referred to in Rule 62.05 have been filed, and the appeal books, the evidence and the Appellant's Statement have been deposited with the Requistrar, with proof of service on all other parties to the appeal, the appeal shall be deemed to be perfected and, (a) not later than 5 days after the appeal is perfected, the appellant shall serve all other parties to the appeal with a notice of the date upon which it was so perfected, and file such notice with proof of service; and

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.07
Placing Appeal on List (6) Subject to subrule (7), an appeal to the Court of Appeal perfected on or before the last day of a month shall be placed on the list of cases to be heard in the second month thereafter in which appeals are to be heard. (7) An appeal to the Court of Appeal perfected in June shall be placed on the list of cases to be heard in September. (8) When perfected, an appeal to the Divisional Court shall be placed on the list of cases to be heard at the appropriate place of hearing.	62.07(6) - (8) - W. 62.06(3)(b) - (d), L.R. - Re the Divisional Court: given the backlog of cases for hearing the 15 day waiting period seems unnecessary and has been deleted. Is this O.K.?	(b) subject to clause (c), appeals to the Court of Appeal perfected on or before the last day of any month shall be placed on the list of cases to be heard in the second month thereafter in which appeals are to be heard; and (c) appeals to the Court of Appeal perfected in June shall be placed on the list of cases to be heard in September; and (d) an appeal to the Divisional Court shall, on the 15th day after it is perfected, be placed on the list of cases to be heard at the appropriate place of hearing.

REVISED RULES OF CIVIL PROCEDURE

APPEAL BOOKS

62.08(1) The appeal books shall contain,

(a) a table of contents [which shall describe each document, including exhibits, by its nature and date];

(b) the notice of appeal and any notice of cross-appeal or supplementary notice of appeal or cross-appeal;

(c) the pleadings;

(d) the order appealed from;

(e) the reasons of the court or tribunal appealed from;

(f) all documentary exhibits which the parties have not agreed to delete, arranged in order by date or, where there are documents having common characteristics, arranged in separate groups in order by date;

(g) any affidavit evidence which the parties have not agreed to delete;

(h) the certificates or agreement as to evidence referred to in rule 62.04;

(i) any order made in respect of the conduct of the appeal;

(j) any other document relevant to the hearing of the appeal; and

(k) a certificate signed by the appellant's solicitor, or on his behalf by someone specifically authorized by him, as to the completeness and legibility of the contents.

COMMENTS

62.08(1)

- W. 62.07(1), L.R.

- re 62.08(1)(a): should the bracketed words, suggested by J. Morden, be included?

- (k) is part of W. 62.07(3).

WILLISTON'S PROPOSED RULES

62.08

62.07 Appeal Books

(1) The appeal books shall contain, in the following order:

(a) an index;

(b) the Notice of Appeal and any Supplementary Notice of Appeal, Notice of Cross-Appeal or Notice of Contention;

(c) the pleadings;

(d) the judgment appealed from;

(e) the reasons for judgment;

(f) such of the exhibits filed as are documents or parts of documents and which are material to the hearing of the appeal in order of the dates of such documents; provided, however, that documents having common characteristics may be arranged in separate groups in order of their dates;

(g) any affidavit evidence;

(h) the certificates referred to in Rule 62.05, or an agreement as to the contents of the Appeal Books and Evidence;

(i) any order made in respect of the conduct of the appeal;

(j) any other document relevant to the hearing of an appeal.

(3) The solicitor or the appellant shall include in the Appeal Books a certificate signed by him, or someone authorized by him, certifying to the completeness and legibility of the contents and the Registrar may refuse to accept the Appeal Books if they do not comply with these rules or are not readily legible.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		62.08
(2) The appeal books may, at the option of the appellant, be completed in accordance with the rules of the Supreme Court of Canada relating to an appeal case.	62.0B(2) - W. 62.07(2). J. Morden questions whether the rule will work since the S. C. of C. rules (Rules 13 - 14) cannot be literally followed in all details e.g. there will be no possibility of having a form P in it and those rules do not provide for the inclusion of certificates or agreement as to evidence.	(2) The Appeal Books may, at the option of the appellant, be completed in compliance with the Rules of the Supreme Court of Canada relating to an appeal case.
(3) The Registrar may refuse to accept the appeal books if they do not comply with these rules or if they are not readily legible.	62.0B(3) - part of W. 62.07(3).	(3) The solicitor or the appellant shall include in the Appeal Books a certificate signed by him, or someone authorized by him, certifying to the completeness and legibility of the contents and the Registrar may refuse to accept the Appeal Books if they do not comply with these rules or are not readily legible.

REVISED RULES OF CIVIL PROCEDURE

APPELLANT'S FACTUM

62.09 The appellant's factum shall be signed by the appellant's counsel, or on his behalf by some person specifically authorized by him, and shall consist of,

(a) Part I - a statement of who is appealing, the court or tribunal appealed from and the result in that court or tribunal;

(b) Part II - a concise summary of the facts relevant to the issues on the appeal, with such reference to the evidence by page and line as is necessary;

(c) Part III - a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue;

(d) Part IV - a statement of the order that the appellate court will be asked to make, including any special order for costs;

(e) Schedule A - a list of the authorities referred to; and

(f) Schedule B - the text of all relevant statutes, regulations and by-laws.

COMMENTS

62.09

- W. 62.08 redrafted based on a redraft given to the Working Group by J. Morden.

WILLISTON'S PROPOSED RULES

62.09

62.08 Appellant's Statement

A statement signed by counsel for the appellant or some person specifically authorized by counsel entitled "Appellant's Statement" shall state who is appealing, the court appealed from and the result in the court below, and shall consist of four parts and schedules as follows:

Part I. A concise summary of all relevant facts with such reference to the evidence by page and line as may be necessary.

Part II. A concise statement setting out clearly and particularly in what respect the judgment appealed from is alleged to be erroneous.

Part III. A concise statement of the law relied upon in support of each issue raised in Part II, including the cases and authorities intended to be cited relating to that issue.

Part IV. A concise statement of the order that the appellate court will be asked to make, including any special disposition with regard to costs.

Schedule A. List of authorities referred to.

Schedule B. The text of all relevant provisions of Statutes or Regulations (or copies of the complete Statute or Regulation may be filed and served with the Statement).

REVISED RULES OF CIVIL PROCEDURE

RESPONDENT'S FACTUM

Filing and Service

62.10(1) Every respondent shall prepare a respondent's factum and shall file with the Registrar,

(a) in an appeal to the Court of Appeal, five copies or

(b) in an appeal to the Divisional Court, three copies,

with proof of service on all other parties to the appeal.

Contents

(2) The respondent's factum shall be signed by the respondent's counsel, or on his behalf by some person specifically authorized by him, and shall consist of,

(a) Part I - a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which he disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary;

(b) Part II - the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise statement of the law and the authorities relating to that issue;

(c) Part III - a statement of any additional issues raised by the respondent, the statement of each issue being followed by a concise statement of the law and the authorities relating to that issue;

(d) Part IV - a statement of the order that the appellate court will be asked to make, including any special order for costs;

(e) Schedule A - a list of the authorities referred to; and

(f) Schedule B - the text of all relevant statutes, regulations and by-laws.

COMMENTS

62.10

- W. 62.09 redrafted based on a redraft given to the Working Group by J. Morden.

WILLISTON'S PROPOSED RULES

62.10

62.09 Respondent's Statement

(1) Every respondent shall deposit with the Registrar in the case of an appeal to the Court of Appeal five copies, and in the case of an appeal to the Divisional Court, three copies, and shall serve upon the appellant and all other parties to the appeal a statement signed by counsel for the respondent or by some person specifically authorized by counsel entitled "Respondent's Statement" which shall consist of four parts and schedules as follows:

Part I. A statement of the facts in the appellant's summary of relevant facts which the respondent accepts as correct and those facts with which he disagrees and a concise summary of any additional facts relied upon with such reference to the evidence by page and line as may be necessary.

Part II. The position of the respondent with respect to the issues raised by the appellant, each issue being followed by a concise statement of the law bearing on the issue, including case and authorities, relating to that issue.

Part III. Any additional issues intended to be raised by the respondent, each issue being followed by a concise statement of the law bearing on the issue, including cases and authorities relating to that issue.

Part IV. A concise statement of the order that the appellate court will be asked to make, including any special disposition with regard to costs.

Schedule A. List of authorities referred to.

Schedule B. The text of all relevant provisions of Statutes or Regulations (or copies of the complete Statute or Regulation may be filed and served with the Statement).

REVISED RULES OF CIVIL PROCEDURE

Cross-Appeal

(3) Where a respondent has served a notice of cross-appeal under rule 62.05,

(a) he shall prepare a factum as an appellant by cross-appeal and deliver it with or incorporate it in his respondent's factum; and

(b) the appellant shall deliver a factum as a respondent by cross-appeal within five days after service of the respondent's factum.

Time for Delivery

(4) In an appeal to the Court of Appeal a respondent's factum shall be delivered not later than the 20th day of the month preceding the month in which the appeal is listed to be heard.

(5) In an appeal to the Divisional Court a respondent's factum shall be delivered not later than twenty days after the appeal is perfected.

COMMENTS

62.10(5)

- Fourteen days changed to twenty days at suggestion of A. Bridges.

WILLISTON'S PROPOSED RULES

62.10

(2) Where a respondent has, pursuant to Rule 62.03, given notice of cross-appeal,

(a) his statement as an appellant by cross-appeal shall be delivered with or incorporated in his Respondent's Statement; and

(b) the appellant shall deliver his statement as a respondent by cross-appeal within 5 days from the receipt of the Respondent's Statement.

(3) In an appeal to the Court of Appeal a Respondent's Statement shall be served and deposited with proof of service upon each of the other parties to the appeal not later than the 20th day of the month preceding the month in which the appeal is listed to be heard.

(4) In an appeal to the Divisional Court the Respondent's Statement shall be served and deposited with proof of service not later than 14 days after the appeal is perfected.

REVISED RULES OF CIVIL PROCEDURE

DISMISSAL FOR DELAY

Motion by Respondent

62.11(1) On motion by the respondent on ten days notice to the appellant, the Registrar may dismiss the appeal for delay,

(a) where the appeal is not perfected within the time prescribed by subrule 62.07(1); or

(b) where a transcript of evidence is required for the appeal and the appellant fails to file proof that he ordered the transcript within the time prescribed by subrule 62.04(5).

COMMENTS

62.11

- W 62.10, substantially redrafted. The rules has been given a new heading because "Failure to Perfect Appeal" does not fully describe the procedure - dismissal may take place for other reasons eg. failure to file proof that evidence has been ordered. The rule has been subdivided, by the use of subheadings, to indicate the dismissal may be as a result of the motion of the respondent or by the registrar of his own motion (the latter provision - similar to present rule 502 - has been reinserted at the suggestion of J. Morden and A. Bridges).

61.11(1)

- Clause (a), part of W62.10(1) redrafted.

- Clause (b), new. This was not covered by Williston. J. Morden commented that it seems reasonable that the respondent should have the right to insist that the evidence be ordered or the appeal dismissed.

- The provision in W62.10(1) re directions as to any cross-appeal is now dealt with below in revised rule 62.13(1).

- The new Judicature Act section 22(2)(b) gives a single judge the jurisdiction to dismiss an appeal for want of prosecution, but makes no reference to the Registrar doing this. Should the section be amended to empower the Registrar?

WILLISTON'S PROPOSED RULES

62.11

62.10 **Failure to Perfect Appeal**

(1) If an appeal to an appellate court is not perfected within the time prescribed or allowed, the respondent may apply to the Registrar, on 10 days notice to the appellant, to have the appeal dismissed as an abandoned appeal, and, if he is also an appellant by cross-appeal, he may move before a judge of the appellate court for directions in respect of the cross-appeal.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.11
On Notice by Registrar (2) The Registrar may on his own initiative take steps under subrules (3) and (4) to dismiss an appeal for delay where, (a) the appellant has not filed proof that he has ordered a transcript of all the evidence that the parties have not agreed to delete, within [sixty] days after service [filing] of the notice of appeal; (b) the appellant has not perfected the appeal within [sixty] days after notification by the court reporter that the evidence has been transcribed; or (c) the appellant has not perfected the appeal, (i) where a transcript of evidence is required for the appeal, within one year; or (ii) where no transcript is required for the appeal, within three months, after service [filing] of the notice of appeal.	62.11(2) - W. 62.10(2-3), part, revised. - Clause (a). The appellant must order the evidence within thirty days after filing the notice of appeal [see 62.04(5)]. Where the appellant fails to do so, the respondent can move immediately to dismiss under subrule (1). Should there be an additional thirty days before the Registrar steps in to dismiss the appeal? Should the time run from service of the notice of appeal (a date known to the Registrar by the copy of the notice of appeal filed) or from filing of the notice? - Clause (b). Should the time period be the same as in (a)? - Clause (c). New. Similar to present rule 502(2). Reinserted at suggestion of J. Morden and A. Bridges.	62.10 (2) If the appellant does not order the evidence in compliance with his undertaking and file proof thereof within the required time, the Registrar, on 10 days notice to the appellant, may order that the appeal be dismissed as an abandoned appeal, unless otherwise ordered by a judge of the appropriate appellate court. (3) If the appeal is not perfected by the appellant within 30 days after notification by the court reporter that the evidence has been transcribed, the Registrar may give notice to the appellant that, unless the appeal be perfected within 10 days thereafter, the appeal will be dismissed as an abandoned appeal.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.11
(3) Where the Registrar proposes to dismiss an appeal for delay, he shall give notice to the parties that the appeal will be dismissed for delay unless it is perfected within ten days after receipt of the notice.	62.11(3) - W. 62.10(2-3), part, revised. At J. Morden's suggestion, the sub-rule provides for notice to all parties, not just the appellant.	
(4) Where the appeal is not perfected within ten days after receipt of a notice under subrule (3), the Registrar shall dismiss the appeal for delay unless, (a) the appellant satisfies the Registrar that the appeal cannot be perfected because the transcript required for the appeal has not been completed although it was ordered within thirty days after the filing of the notice of appeal; or (b) the appellant has obtained from a judge of the appellate court an order extending the time for perfecting the appeal.	62.11(4) - W. 62.10(4), revised. The Registrar is given the power to extend time, but only where the delay is due to unavailability of a transcript ordered as required by the rules. Is this okay? A. Bridges was concerned about any substantial discretion being given to the Registrar. The Registrar's decision can be appealed to a judge - see 62.15(2). - Is there a need for a certificate of dismissal, as opposed to an order, as provided by Williston? Is there a feeling of reluctance about the Registrar making an order?	(4) If the appeal is not perfected within the 10 days from the giving of either of such notices or within such further time as is allowed by a judge of the appropriate appellate court, the Registrar shall dismiss the appeal as an abandoned appeal with costs to be taxed and shall issue a Certificate of Dismissal (Form 62G.)

REVISED RULES OF CIVIL PROCEDURE

ABANDONED APPEALS

Filing of Notice of Abandonment

62.12(1) An appellant may abandon his appeal by filing with the Registrar and serving on the respondent a notice of abandonment (Form 62G) signed by the appellant's solicitor, stating that he has abandoned the appeal.

Effect of Filing

(2) Where a notice of abandonment is filed the appeal is at an end, [unless within fifteen days the respondent applies to a judge of the appellate court for directions,] and the respondent is entitled without an order to his costs of the appeal.

Deemed Abandonment

(3) Where a notice of appeal is served but not filed within ten days after service, the appeal shall be deemed to be abandoned and subrule (2) applies, with necessary modifications.

COMMENTS

62.12

- W62.11 substantially revised in response to J. Morden's comments.

62.12(1)

- Part of W62.11(1). What is the best term to use here "discontinue" (Williston) or "abandon" (revised rule)?

62.12(2)

- Part of W62.11(1). J. Morden asks what is the purpose of the words in square brackets?

62.12(3)

- New. Would it be preferable to deal with this situation by making it a further ground for dismissal for delay at the motion of the respondent under 62.11(1)?

WILLISTON'S PROPOSED RULES

62.12

62.11 Appellant May Discontinue

(1) An appellant may discontinue his appeal by filing with the Registrar and serving upon the respondent a notice, signed by the appellant or his solicitor, stating that he has so discontinued it and thereupon the appeal is at an end, and the respondent is entitled to his costs of the appeal unless within 15 days the respondent applies to a judge of the appellate court for directions.

(2) Where an appeal is discontinued or abandoned, a respondent who has cross-appealed may deliver a Notice of Election to Proceed (Form 62H) within 15 days thereafter, in which case he shall also file an undertaking to pay for the evidence not already prepared. In default of so doing, the cross-appeal shall be deemed to be discontinued without costs unless otherwise ordered by a judge of the appropriate appellate court.

REVISED RULES OF CIVIL PROCEDURE

CROSS-APPEAL WHERE APPEAL DISMISSED FOR DELAY OR ABANDONED

62.13(1) Where an appeal is dismissed for delay or abandoned, a respondent who has cross-appealed may,

(a) deliver a notice of election to proceed (Form 62H) within fifteen days thereafter, in which case he shall also file an undertaking to pay for any transcript of evidence not already prepared; and

(b) move before [the Registrar] for directions in respect of the cross-appeal.

(2) Where the respondent does not deliver a notice of election to proceed, the cross-appeal shall be deemed to be abandoned without costs unless otherwise ordered by a judge of the appellate court.

COMMENTS

62.13

- New as a separate rule (in response to J. Morden's comments) but based on part of W62.10(1) and on W62.11(2).

- Re 62.13(1)(b), is it appropriate to give the power to give directions to the Registrar? (It has the advantage that if a cross-appealing respondent moves for a dismissal under 62.11(1) he may join with the motion one for directions as to the cross-appeal.)

Williston 62.12

- Has been deleted. The right of appeal to the Divisional Court in such cases will be provided for in the Act and the rule 62 procedure applies because of revised rule 62.01(1).

WILLISTON'S PROPOSED RULES

62.13

62.10 Failure to Perfect Appeal

(1) If an appeal to an appellate court is not perfected within the time prescribed or allowed, the respondent may apply to the Registrar, on 10 days notice to the appellant, to have the appeal dismissed as an abandoned appeal, and, if he is also an appellant by cross-appeal, he may move before a judge of the appellate court for directions in respect of the cross-appeal.

62.11 (2) Where an appeal is discontinued or abandoned, a respondent who has cross-appealed may deliver a Notice of Election to Proceed (Form 62H) within 15 days thereafter, in which case he shall also file an undertaking to pay for the evidence not already prepared. In default of so doing, the cross-appeal shall be deemed to be discontinued without costs unless otherwise ordered by a judge of the appropriate appellate court.

62.12 **Appeals from a Final Judgment or Order of a Master, Local Judge, Local Master or other Officer.**

A person affected by a final judgment or order of a master, local judge, local master or other officer may appeal therefrom to the Divisional Court and the provisions of Rule 62 in so far as they apply to an appeal to the Divisional Court shall apply to any such appeal.

REVISED RULES OF CIVIL PROCEDURE

MOTION FOR LEAVE TO APPEAL

62.14(1) Where an appeal to the Court of Appeal [to an appellate court] requires the leave of that court, tbe notice of motion for leave shall be served within fifteen days after the date of the order from which the appeal is to be taken, or such further time as is allowed by the court hearing the motion for leave to appeal, and shall name the first available hearing date, subject to subrule 37.07(6) (time for service of notice of motion).

(2) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave.

COMMENTS

62.14

- W62.13 substantially redrafted.

- W62.13(1) has been deleted since the need for leave to appeal is imposed by statute, eg. new J.A. section 15(1)(b) re appeals from the Divisional Court; J.R.P.A. section 6(2). Leave may also be necessary under other statutes eg. see new J.A. section 26(2) re orders made on consent or where the appeal is as to costs only.

- Should this rule be limited to the Court of Appeal? Why not extend it also to the Divisional Court (i.e. to appellate courts generally since there may be situations where a party can appeal to the Divisional Court but only with leave of that court: see eg. under new J.A. 26(2) re appeals as to costs only.

- Re extending time for moving for leave to appeal, is not rule 3.03(2) inconsistent?

WILLISTON'S PROPOSED RULES

62.14

62.13 **Motion for Leave to Appeal from any Judgment or Order of the Divisional Court**

(1) An appeal to the Court of Appeal from any judgment or an order of the Divisional Court shall not lie unless leave to appeal shall have been granted by the Court of Appeal.

(2) The motion for leave shall be made within 15 days and returnable within 30 days after the date of the judgment or order sought to be appealed from.

(3) If leave be granted, the Notice of Appeal shall be served and the appeal set down within 7 days after the granting of leave.

(4) Except as provided in this sub-rule, the provisions of Rule 62 shall apply to any such appeal.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		62.15
MOTIONS IN APPELLATE COURT *General* 62.15(1) Motions in an appellate court are governed by the provisions in Rule 37 other than rules 37.02 to 37.05. *Appeal from Registrar* (2) An appeal lies from an order or dismissal by the Registrar to a judge of the appellate court and shall be made by motion. *Appeal from a Single Judge* (3) An appeal lies from the order of a judge of an appellate court to the appellate court and shall be made by motion.	62.15(1) - New. J. Morden pointed out that Williston contained an equivalent to present R497b(3). Part, but not all, of the motions rule should apply to motions in an appellate court, eg. the provisions re place of hearing should not apply. (What about the jurisdiction provision - 37.02(1)?) This rule is difficult to draft. 62.15(2) - New to make it clear that the Registrar's decisions are reviewable and that a motion is the appropriate procedure. 62.15(3) - New. Note that the new J.A. section 22(3) presently confers this right of appeal but it is subject to leave and to section 26. - Suggested Alternate Approach. The jurisdiction of the Registrar to grant dismissals and give directions (see above) could be dealt with in section 22. The right of appeal from both the Registrar and the single judge could also be dealt with there. If this is done then all 62.15(2) and (3) need say is that the appeal is by notice of motion.	

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
INTERVENTION IN APPEAL 15.03(1) Any person interested in a proceeding in an appellate court between other parties may intervene in the appeal with leave, on such terms and with such privileges as are set out in the order granting leave. (2) Leave to intervene may be granted by the appellate court or, (a) where the appeal is to the Court of Appeal, the Chief Justice or Associate Chief Justice of Ontario; or (b) where the appeal is to the Divisional Court, the Chief Justice of the High Court or a judge designated by him.	New 15.03 - New, in response to suggestions of J. Morden and A. Bridges. See existing rule 504a and minutes, pp 78-9. The Working Group suggests the rule should go in Rule 15 rather than Rule 62, as it would be misleading to have an intervention rule that omits intervention in appeals and judicial reviews and it seems unnecessarily duplicative to put a rule in both Rule 62 and Rule 69. For the Divisional Court, it is proposed that the chief justice could delegate the leave-granting.	

Rule 504a

504a. Any person interested in an appeal to the Court of Appeal between other parties may, by leave of the Court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario, intervene therein upon such terms and conditions and with such rights and privileges as the Court, the Chief Justice or the Associate Chief Justice may determine. [New, O. Reg. 933/79, s. 6.]

REVISED RULES OF CIVIL PROCEDURE

RULE 63 APPEALS FROM INTERLOCUTORY ORDERS

APPEAL FROM INTERLOCUTORY ORDER OF A MASTER, LOCAL MASTER OR OTHER OFFICER.

To Whom Appeal Lies

63.01(1) Except in the case of an order for interim relief in respect of any claim made in a divorce proceeding, a person affected by an interlocutory order of a master, local master or other officer of the Supreme Court may appeal therefrom to a judge of the Supreme Court [, and a local judge has no jurisdiction to hear the appeal].

COMMENTS

RULE 63 APPEALS FROM INTERLOCUTORY ORDERS

63.01(1)

- W. 63.01(1) revised.

- Reference to orders made by local judge has been deleted since the Sub-committee has decided that their interlocutory orders should be appealed in the same manner as the interlocutory order of a Supreme Court judge i.e. to the Divisional Court with leave (see revised rule 63.03(1) below).

- Should the words in square brackets go in to make it clear that a local judge does not have jurisdiction (as has already been decided)? They are not technically essential, since this is an appeal (by notice of appeal) and not a motion, and hence the local judge is not invested with jurisdiction by revised rule 37.02(2). However the Working Group feels the words should be included out of an abundance of caution.

WILLISTON'S PROPOSED RULES

63.01

APPEALS

RULE 63 APPEALS FROM INTERLOCUTORY JUDGMENTS OR ORDERS IN THE SUPREME COURT

63.01 Appeal from an Interlocutory Judgment or Order of a Master, Local Judge, Local Master or other Officer

(1) Except in the case of an interim order in respect of any claim made in a divorce proceeding, a person affected by an interlocutory judgment or order of a master, local judge, local master or other officer may appeal therefrom to a judge of the High Court.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		63.01
Where Jurisdiction Arises From Consent (2) An appeal may be made even though the order was made in the exercise of jurisdiction that the master, local master or other officer had only by consent.	63.01(2) - W. 63.01(2), L.R.	(2) An appeal may be made notwithstanding that the judgment or order was in respect of a proceeding as to which the master, local judge, local master or other officer had jurisdiction only by consent.
Order of Local Judge That Could Have Been Made As Local Master (3) Where a local judge makes an [interlocutory] order that he could have made as a local master, for the purposes of an appeal the order shall be deemed to have been made by a local master.	63.01(3) - New. Formerly revised rule 37.03(6). It was decided at Millcroft to transfer this provision to Rule 63. - An equivalent provision would appear to be necessary for final orders that a local judge could have made as a local master (to ensure that they go to the Divisional Court rather than to the Court of Appeal). Since in the new Act all appeal routes are to be in the Act, probably both this subrule and the provision re final orders should go in the Act.	37.03(6) REVISED RULE (6) Where on a motion a local judge makes an order that he could have made as a local master, for the purposes of an appeal under Rule 63 the order shall be deemed to have been made by a local master.
Time For Appeal (4) The appeal shall be commenced by serving a notice of appeal (Form 63A) on all parties whose interests are affected by the appeal, within seven days after the date of the order appealed from or within such further time as is allowed by the judge hearing the appeal.	63.01(4) - Part of W. 63.01(3), substantially redrafted along the lines of revised rule 62.03(1). - A provision has been added indicating who may extend the time.	(3) The appeal shall be on notice setting out the grounds of the appeal, served within 7 days and returnable within 14 days after the judgment or order was made.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		63.01
Hearing Date (5) The notice of appeal shall name the first available hearing date that is not less than ten days after the date of service of the notice of appeal.	63.01(5) - Part of W. 63.01(3), substantially redrafted.	
Content of Notice (6) The notice of appeal (Form 63A) shall state the relief sought and the grounds of appeal, including a reference to any statutory provision or rule to be relied on.	63.01(6) - New to spell out the content of the notice of appeal. It is modelled after revised rule 37.06 (notice of motion) and 62.03(3) (notice of appeal to appellate court).	
Place of Hearing (7) The appeal may be heard in any county in which a judge of the Supreme Court is available to hear motions.	63.01(7) - New. Since the appeal is by notice of appeal, not by notice of motion, it seems desireable to spell out where the appeal may be heard. Modelled after revised Rule 37.03(4).	

REVISED RULE

37.03(4)

To Whom Motion to be Made

(4) Where a motion in a proceeding in the Supreme Court is properly brought in the Judicial District of of York, it shall be brought before a master, if within his jurisdiction and, if not, it shall be made to a judge of the Supreme Court.

REVISED RULES OF CIVIL PROCEDURE

Appeal Record

(8) The appellant shall, not later than three days before the hearing, serve on every other party and file an appeal record consisting of,

(a) a table of contents;

(b) the notice of appeal;

(c) the order appealed from and the reasons for the decision, if any;

(d) such other material filed in the proceeding as is necessary for the hearing of the appeal; and

(e) a factum consisting of a concise statement, without argument, of the facts and law relied on by the appellant.

(9) The reapondent shall, not later than 4 p.m. on the day before the hearing, serve on every other party and file,

(a) [any further material filed in the proceeding that he believes is necessary for the hearing of the appeal]; and

(b) a factum consisting of a concise statement, without argument, of the facts and law relied on by the respondent.

(10) A judge may dispense with compliance with subrules (8) and (9) in whole or in part.

COMMENTS

63.01(8) - (10)

- W. 63.02 substantially revised.
- J. Morden suggested a record and a factum from both parties is necessary. (This provision has been modelled after the application record rule).
- Is clause (9) (a) really necessary (cf. present R. 238(2)(a)(v)).

WILLISTON'S PROPOSED RULES

63.01

63.02 Record

(1) Where an appeal is taken to a judge of the High Court, the appellant shall, on or before the day prior to the hearing of the appeal, transmit to the registrar for the use of the court and furnish to each respondent a copy of the record containing copies of documents in the following order:

(a) An index;

(b) The Notice of Appeal;

(c) The judgment or order appealed from and the reasons for the decision, if any;

(d) Such of the material filed in the proceeding as is necessary for the due hearing of the appeal; and

(e) A concise statement, without argument, of the facts and law relied on by the appellant.

Rule 238(2)(a)

(v) **Such other material as is necessary for the due hearing of the appeal or motion.** [Amended, O. Regs. 115/72, s. 6; 379/80, s. 2.]

63.02(2) In all such cases each respondent shall, on or before the day prior to the hearing of the appeal, transmit to the registrar one copy for the use of the court and furnish to each of the other parties one copy of a concise statement, without argument, of the facts and law relied on by him.

63.02(3) A judge of the High Court may dispense with compliance with this sub-rule either in whole or in part.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		63.02
APPEAL FROM COUNTY COURT INTERLOCUTORY ORDERS 63.02 The procedure prescribed by subrules 63.01(4) to (10) applies to an appeal to a judge of the Supreme Court from an interlocutory order of a county court judge under section xx of the Courts of Justice Act.	63.02 - New. Williston omitted to provide the procedure that would apply in such cases.	
MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF A JUDGE OR LOCAL JUDGE OF THE SUPREME COURT. *Leave to be Obtained from Another Judge* 63.03(1) Leave to appeal from an interlocutory order of a judge or local judge of the Supreme Court under section xx of the Courts of Justice Act shall be obtained from a judge or local judge other than the one who made the order.	63.03(1) - W. 63.03(1) substantially revised. - The Act will be amended to specifically spell out the right of appeal and that it is with leave as provided in the rules. Hence the rule need only deal with from whom leave is to be obtained and how. - The Sub-committee has decided that a local judge can grant the leave (Minutes page 211).	63.03 **Motion for Leave to Appeal from an Interlocutory Judgment or Order of a Judge of the High Court** (1) An appeal from an interlocutory judgment or order of a judge of the High Court, other than an appeal from an interim order in respect of any claim made in a divorce proceeding, shall not lie unless leave to appeal therefrom has been obtained from a judge of the High Court other than the judge appealed from.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		63.03
Time for Service of Motion (2) The notice of motion for leave shall be served within seven days after the date of the order appealed from or within such further time as is allowed by the judge hearing the motion for leave to appeal.	63.03(2) - W. 63.03(2), revised.	(2) The motion for leave shall be made within 7 days from the making of the judgment or order appealed from or such further time as is allowed by the judge hearing the motion for leave to appeal.
Hearing Date (3) The notice of motion for leave shall name the first available hearing date that is not less than three days after service of the notice of motion.	63.03(3) - New.	
Grounds on Which Leave May Be Granted (4) Leave to appeal shall not be granted unless, (a) there is a conflicting decision by another judge or court on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that the appeal be heard; or (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his opinion, the appeal should be heard.	63.03(4) - W. 63.03(3).	(3) Leave to appeal shall not be granted unless, (a) there is a conflicting decision by another judge or court upon the matter involved in the proposed appeal and it is, in the opinion of the judge hearing rhe motion, desirable that leave to appeal be granted; or (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the appeal involves matters of such importance that, in his opinion, leave to appeal should be granted.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		63.03
(5) The judge granting leave shall briefly state his reasons in writing.	63.03(5) - W. 63.03(4).	(4) The judge granting leave shall briefly state his reasons in writing.
Subsequent Procedure Where Leave Granted (6) Where leave is granted the notice of appeal required by rule 62.03, together with the appellant's certificate as to evidence required by subrule 62.04(1), shall be delivered within ten days after the granting of leave.	63.03(6) - W. 63.03(5), substantially revised. The Williston provision was criticized by J. Morden and the rule has been redrafted. A policy decision is required here - what type of "record" should be used here? Rule 62 appeal book and factums, or a record which includes a factum (as was done in Rule 38, application record and Rule 63.01 (8) - (10) appeal record)? Working Group. We believe that the usual Rule 62 appeal procedures (appeal books and factums) should apply to these appeals because (a) they apply to appeals from final judgments of the master, etc., and (b) to get to the Divisional Court the appellant will have had to satisfy the 63.03(4) tests so there should be full factums to assist the Court.	(5) If leave be granted, the appeal shall be to the Divisional Court and the Notice of Appeal shall be served and the appeal set down within 7 days after the granting of leave. Three copies of the Appeal Book, prepared in compliance with Rule 62.07, shall be delivered within 7 days thereafter, but, in the case of an appeal from an interlocutory order, the provisions of Rules 62.06 to 62.09 inclusive shall not apply. (6) Except as provided in this sub-rule, the provisions of Rule 62 in so far as they are applicable to an appeal to the Divisional Court shall apply to an appeal from an interlocutory judgment or order of a judge of the High Court.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		63.04

COSTS SANCTION

63.04 Where, on the hearing of an appeal or a motion for leave to appeal, the court is satisfied that the appeal or motion for leave to appeal ought not to have been made, the court shall,

(a) fix the costs of the appeal or motion and order them to be paid forthwith; or

(b) order the costs of the appeal or motion to be paid forthwith after assessment.

63.04

- New, modelled after 59.03(1) (costs on motions). Without this provision the power, though available on the motion, would not be available on the appeal from the resulting order.

- Working Group suggests that if 59.03(1) is to achieve its intended purpose - discouraging unfounded motions - it would be more likely to do so if it were placed in the motions rule.

REVISED RULE

Costs of a Motion

Contested Motion

59.03(1) Where, on the hearing of a contested motion, the court is satisfied that the motion ought not to have been made or opposed, as the case may be, the court shall,

(a) fix the costs of the motion and order them to be paid forthwith; or

(b) order the costs of the motion to be paid forthwith after assessment

REVISED RULES OF CIVIL PROCEDURE

RULE 64 STAY PENDING APPEAL

AUTOMATIC STAY WITHOUT ORDER

Final Order Stayed for Thirty Days

64.01(1) A final order is stayed for thirty days from the date of the order, unless otherwise ordered by the judge or officer who made it.

Final Order Stayed Pending Appeal

(2) A final order is stayed on the delivery of a notice of appeal from the order until the disposition of the appeal, unless otherwise ordered by [the judge or officer who made the order or] a judge of the court to which the appeal has been taken.

COMMENTS

RULE 64 STAY PENDING APPEAL

64.01(1)

- W. 64.01(1)(a), L.R.

- This provision limits the jurisdiction to relieve against the automatic stay to the person who made the order. (Williston was even narrower: apparently that person could do it but only at the trial or hearing at which the order was made). Is either approach wise? Should the jurisdiction be extended to any other "judge or officer having concurrent jurisdiction" (cf. 64.02(2)).

64.01(2)

- W. 64.01(1)(b), revised.

- Williston (unintentionally?) did not make any provision for relief against this form of automatic stay. Today, by R. 506(1), a judge of the appellate court can lift the stay. Should there be a power to lift the stay? Who should have the jurisdiction?

WILLISTON'S PROPOSED RULES

64.01

APPEALS

RULE 64 STAY OF PROCEEDINGS PENDING APPEAL

64.01(1) (a) all proceedings to enforce the judgment and all proceedings pursuant to the judgment shall be stayed for a period of 30 days, unless otherwise ordered by the judge or officer presiding at the trial or hearing of the proceeding;

64.01(1) (b) on the serving and filing of a Notice of Appeal, with proof of service, all proceedings to enforce the judgment and all proceedings pursuant to the judgment shall be stayed pending the disposition of the appeal.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		64.01
Exceptions to Stay without Order (3) Subrules (1) and (2) do not apply to an injunction or mandatory order or an order awarding custody of or access to a child, support or maintenance.	64.01(3) - part of W. 64.01(1), revised. - Reference to the Divorce Act and F.L.R. Act deleted as unnecessary and unduly restrictive e.g. it would not include orders under the Reciprocal Enforcement of Maintenance Orders Act. - "Mandamus" changed to "mandatory order" to coincide with a similar change to J.A. s.45.	64.01 **Where Proceedings are Stayed Without Order** (1) Except in a case where the judgment appealed from is an interlocutory judgment or awards an injunction, a mandamus, maintenance under the *Divorce Act (Canada)* or support under *The Family Law Reform Act 1978*, or the custody of or access to a child,
(4) Subrule (1) does not apply to an order obtained on consent or a judgment in default of defence.	64.01(4) - W. 64.01(2).	64.01 (2) This sub-rule does not apply to a judgment obtained on consent or in default of defence.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		64.02
STAY ONLY BY ORDER *Injunction, Support or Custody* 64.02(1) An order referred to in subrule 64.01(3), whether final or interlocutory may be stayed only by order of the judge or officer who made it or a judge of the court to which an appeal from the order has been taken.	64.02(1) - W. 64.02(2), revised. Placed before W. 64.02(1) because it is easier to deal with a specific kind of final and interlocutory orders and then refer to all other interlocutory orders. Should the power to stay be exercisable only by the judge who made the order? See subrule (2).	64.02 (2) Where any judgment appealed from awards an injunction, a mandamus or maintenance under the *Divorce Act (Canada)* or support under *The Family Law Reform Act 1978*, or the custody of or access to a child, there shall be no stay of proceedings to enforce the judgment or of proceedings pursuant to the judgment pending the disposition of an appeal therefrom unless ordered by the judge presiding at the trial or hearing of the proceeding or by a judge of the appropriate appellate court.
Interlocutory Order (2) Any other interlocutory order may be stayed only by order of the judge or officer who made it or another judge or officer having concurrent jurisdiction.	64.02(2) - W. 64.02(1), revised. This is the only provision permitting another judge to lift or impose a stay - see above.	**64.02 Where Proceedings May be Stayed by Order** (1) Where any order appealed from is an interlocutory order, there shall be no stay of proceedings to enforce the order or of proceedings pursuant to the order pending the disposition of an appeal therefrom, unless ordered by the judge or officer who made the order or by any other judge or officer having concurrent jurisdiction.
	Williston 64.02(3) - Omitted. Covered by the other provisions in Rule 64 as to when an injunction, etc. are stayed and what is the effect of a stay.	64.02 (3) No order made in aid of the enforcement of any interlocutory judgment or of any final judgment awarding an injunction, a mandamus, maintenance or support for a spouse or child, or the custody of or access to a child shall be stayed by an appeal from such order, unless otherwise ordered by the judge or officer who made the order, or a judge of the appropriate appellate court.

REVISED RULES OF CIVIL PROCEDURE

EFFECT OF STAY

Generally

64.03(1) Where an order is stayed, no steps may be taken to enforce the order or pursuant to the order, except,

(a) by order of a judge; or

(b) as provided in subrules(2) to (4).

Entry of Order and Assessment of Costs

(2) A stay does not prevent the settling, signing and entering of the order or the assessment of costs.

COMMENTS

64.03(1)

- W. 64.01(1)(a-b), part. The preceding rules speak merely of a stay of the order. Rule 64.03 spells out what a stay prevents and what a stay permits to be done Note that the lifting of a stay may be done by order of a judge. This must be made to fit with the scheme finally adopted for which judge or officer may grant a stay.

64.03(2)

- W. 64.03(1), part, L.R., plus existing rule 508 (costs), which was omitted from Williston.

WILLISTON'S PROPOSED RULES

64.03

64.01(3) (a) all proceedings to enforce the judgment and all proceedings pursuant to the judgment shall be stayed for a period of 30 days, unless otherwise ordered by the judge or officer presiding at the trial or hearing of the proceeding;

(b) on the serving and filing of a Notice of Appeal, with proof of service, all proceedings to enforce the judgment and all proceedings pursuant to the judgment shall be stayed pending the disposition of the appeal.

64.03 Effect of Stay of Proceedings

(1) Where proceedings are stayed by or pursuant to this rule, the stay shall not operate to prevent the settling, signing and entering of the judgment, the issuing of any Writ of Seizure and Sale and the filing thereof in the office of a sheriff, or recording it in a land titles office, but no other proceedings to enforce the judgment and no proceedings pursuant to the judgment shall be taken unless otherwise ordered by the judge or officer presiding at the trial or hearing of the proceeding or by a judge of the appropriate appellate court.

Rule 508.

508. Where the execution of a judgment is stayed pending an appeal, all further proceedings in the action, other than the issue of the judgment and the taxation of costs thereunder, shall be stayed unless otherwise ordered by a judge of the appellate court. [Amended, O. Reg. 115/72, s. 10.]

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		64.03
Writ of Seizure and Sale (3) A stay does not prevent the issue of a writ of seizure and sale or the filing of the writ in a sheriff's office or land registry office, but no direction to levy under the writ shall be filed with a sheriff while the stay remains in effect.	64.03(3) - W. 64.03(1), part, L.R. The best way to prevent the writ from being enforced seemed to be a prohibition on filing a direction to levy.	64.03 Effect of Stay of Proceedings (1) Where proceedings are stayed by or pursuant to this rule, the stay shall not operate to prevent the settling, signing and entering of the judgment, the issuing of any Writ of Seizure and Sale and the filing thereof in the office of a sheriff, or recording it in a land titles office, but no other proceedings to enforce the judgment and no proceedings pursuant to the judgment shall be taken unless otherwise ordered by the judge or officer presiding at the trial or hearing of the proceeding or by a judge of the appropnate appellate court.
(4) Where an order is stayed and a writ of seizure and sale has been filed in a sheriff's office, the registrar shall issue, on requisition by the appellant, a certificate of stay (Form 64A) and, when the certificate has been filed with the sheriff, the sheriff shall not commence or continue to execute the writ until he is satisfied that the stay is no longer in effect.	64.03(4) - W. 64.03(2), L.R.	64.03 (2) Where proceedings are stayed by or pursuant to this rule and a Writ of Seizure and Sale has been filed in the office of a sheriff, the appellant is entitled to obtain a certificate from the registrar that proceedings have been stayed pending the appeal and, upon the certificate being filed with the sheriff, he shall not commence or continue to execute the Writ until he is satisfied that the appeal has been dismissed.
(5) The court may set aside the issue or filing of a writ of seizure and sale where the appellant gives security for the order under appeal that is satisfactory to the court.	64.03(5) - W. 64.04, L.R. Does this fit comfortably here, or does it need to be a separate rule?	64.04 When Writ of Seizure and Sale May be Set Aside Nothing in this rule shall prevent the court from setting aside the issuance and filing of a Writ of Seizure and Sale upon the appellant furnishing proper and sufficient security in lieu thereof.

REVISED RULES OF CIVIL PROCEDURE

RULE 65 MORTGAGE ACTIONS

INTERPRETATION

65.01 In rules 65.02 to 65.10,

(a) "master" includes a local master and, where a mortgage action is in a county court, a judge or the clerk of the court;

(b) "subsequent encumbrancer" means a person who has a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question.

STATEMENT OF CLAIM IN MORTGAGE ACTIONS

65.02(1) In an action for foreclosure or sale of a mortgaged property the statement of claim shall be in Form 16B.

(2) In a mortgage action, a mortgagee may claim either foreclosure of the equity of redemption or sale of the mortgaged property, and in addition he may claim payment of the mortgage debt by any party personally liable for it and possession of the mortgaged property.

COMMENTS

65.01

-(a) Partly new, partly based on W. 65.04(1)(q). As drafted by Williston, Rule 65 speaks in terms of the reference always being before the master. Since this will not always be so (e.g. where the proceeding is in the Supreme Court outside of Toronto, or in the County Court) this provision has been added.

-(b) New. Williston uses the term without defining it, except by inference in W. 65.04(1)(a).

65.02(1)

- New. Suggested by R. Peterson.

65.02(2)

- W. 65.01(1), 65.02(1) and R. 464. The revised rule is more informative than Williston (as is R. 464) because it makes it clear that claims for foreclosure and sale may not be joined.

WILLISTON'S PROPOSED RULES

65.01

RULE 65 MORTGAGE ACTIONS

65.01(1) *What Claims may be Joined*
A mortgagee may, in an action for foreclosure of the equity of redemption, claim payment of the mortgage debt by any party personally liable therefor and possession of the mortgaged property.

65.02(1) *What Claims may be Joined*
A mortgagee may, in an action for sale of the mortgaged property, claim payment of the mortgage debt by any party personally liable therefor and possession of the mortgaged property.

464. A mortgagee may in an action claim foreclosure of the equity of redemption or a sale of the mortgaged premises and payment of the mortgage debt by any party personally liable therefor and possession of the mortgaged premises. The writ shall be endorsed in accordance with the form applicable thereto. R.R.O. 1970, Reg. 545, r. 464.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.03(1)
FORECLOSURE ACTIONS *Persons to be Joined* 65.03(1) All persons who may be interested in the equity of redemption shall be made defendants in an action for foreclosure unless, by reason of their number or otherwise, it is more expedient to commence the action without making subsequent encumbrancers defendants, [but rather to add them as defendants on a reference].	65.03(1) - W. 65.01(2)(a). Are the bracketed words useful and accurate?	65.01 Foreclosure Actions (2) *All Persons to be Joined* (a) Unless, by reason of their number or otherwise, it is expedient to commence the action without making subsequent encumbrancers defendants, all persons who may be interested in the equity of redemption shall be made defendants in an action for foreclosure.
(2) Where a foreclosure action is commenced without making subsequent encumbrancers defendants, the plaintiff may, on obtaining judgment with a reference, make a motion to the master on the reference to add the subsequent encumbrancers as defendants.	65.03(2) - part of W. 65.01(2)(b).	(b) Where an action for foreclosure is commenced without making subsequent encumbrancers defendants, the plaintiff may, upon obtaining judgment with a reference, apply to the master on the reference to add the subsequent encumbrancers as defendants; but the master may, in his discretion, disallow the additional costs occasioned thereby where he considers that such procedure was adopted without sufficient reason.
(3) Where the master considers that subsequent encumbrancers should have been named as defendants in the statement of claim, he may disallow the additional costs of adding them on the reference.	65.03(3) - part of W. 65.01(2)(b), L.R.	

REVISED RULES OF CIVIL PROCEDURE

Request to Redeem

(4) Where a defendant in a foreclosure action wishes to redeem the mortgaged property, he shall deliver a request to redeem (Form 65A) within the time prescribed for his defence, whether or not he delivers a statement of defence.

(5) Where the defendant delivering a request to redeem is a subsequent encumbrancer, the request shall contain particulars, verified by affidavit, of his claim to be entitled to redeem and the amount owing to him.

Effect of Request to Redeem

(6) A defendant who has delivered a request to redeem is entitled to,

(a) seven days notice of the taking of the account of the amount due to the plaintiff; and

(b) three months from the date of the taking of the account of the amount due to the plaintiff within which to redeem the mortgaged property, unless he is a subsequent encumbrancer, in which case he becomes entitled to redeem within the three month period only if his claim is not disputed or is proved on a reference.

COMMENTS

65.03(4)

- part of W. 65.01(3). "File" changed to "deliver". O.K.? (This change has also been made in a number of succeeding sub-rules.)

65.03(5)

- Part of W. 65.01(3).

65.03(6)

- W. 65.01(4). Working Group deleted the word "calendar" before month as being more likely to confuse than enlighten (and because the Interpretation Act covers the point in any event).

WILLISTON'S PROPOSED RULES

65.03(4)

(3) *Right to Redeem must be Requested*

Where a defendant in an action for foreclosure requests the right to redeem the mortgaged property, he shall within the time limited for his defence, and whether a Statement of Defence is delivered or not, file a Request to Redeem (Form 65A) and, where the defendant filing such Request is a subsequent encumbrancer, the Request shall contain particulars of his claim verified by an affidavit.

(4) *Effect of Filing Request to Redeem*

Any defendant who has filed a Request to Redeem shall be entitled to,

(a) seven days notice of the taking of the account of the amount due to the plaintiff;

(b) three calendar months from the date of the taking of the account of the amount due to the plaintiff within which to redeem the mortgaged property unless he is a subsequent encumbrancer, in which case he shall only become so entitled if his claim is not disputed or, if disputed, is proved on a reference to the master.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.03(7)
Default Judgment where no Request to Redeem (7) Where the defendant in a foreclosure action has been noted in default and has failed to deliver a request to redeem and the plaintiff, (a) desires a reference as to subsequent encumbrancers, the plaintiff may require the registrar to sign judgment for foreclosure with a reference (Form 65B); or (b) does not desire a reference as to subsequent encumbrancers, the plaintiff may require the registrar to sign judgment for immediate foreclosure (Form 65C). (8) Where no subsequent encumbrancer proves a claim on the reference, the master shall so state in his report and, on confirmation of the report, the plaintiff is entitled to a final order of foreclosure (Form 65D). (9) Where a subsequent encumbrancer added on a reference files a request to redeem and proves his claim on the reference, he is entitled to redeem the mortgaged property within the three month period set out in clause (6)(b).	65.03(7) - Part of W. 65.01(5), L.R. - Working Group. The present rules and Williston speak in terms of "where a reference is desired" implying choice on the part of the plaintiff. In light of revised rule 65.03(1) and (2) making subsequent encumbrances "necessary" parties, should this rule speak in terms of "necessity for a reference" rather than the "desire" for one? 65.03(8) - Part of W. 65.01(5), L.R. 65.03(9) - Part of W. 65.01(5), L.R. "Usual" period changed to three months: is this change correct?	(5) *Default Judgment* In an action for foreclosure, where the defendant has been noted in default and has failed to file a Request to Redeem, the plaintiff may require the registrar to sign Judgment for Immediate Foreclosure (Form 65B) unless a reference is desired as to subsequent encumbrancers. Where a reference is desired as to encumbrancers, the plaintiff is entitled to Judgment for Foreclosure with a Reference (Form 65C); and, if no encumbrancer proves a claim, the master shall so certify and, upon confirmation of his report, the plaintiff shall be entitled to a Final Order of Foreclosure (Form 65D). If, upon the reference, a subsequent encumbrancer proves a claim, he shall be granted the usual period of redemption if so requested.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.03(10)
Default Judgment where Request to Redeem Delivered		
(10) Where a defendant has been noted in default but has delivered a request to redeem and the plaintiff, (a) desires a reference as to subsequent encumbrancers, the plaintiff may request the registrar to sign judgment for foreclosure with a reference (Form 65B); or (b) does not desire a reference as to subsequent encumbrancers, the plaintiff may require the registrar, (i) to take an account of the amount due to the plaintiff; (ii) where more than one party is entitled to redeem, to determine the priority in which each is so entitled; and (iii) sign judgment for foreclosure (Form 65E).	65.03(10) - Part of W. 65.01(6), L.R.	(6) *Taking the Account* Where no reference as to subsequent encumbrancers is desired, the registrar may take the account of the amount due to the plaintiff and, where more than one party is entitled to redeem, determine the priority in which each is so entitled and sign a Judgment for Foreclosure (Form 65E). Where, on the taking of the account or in determining priorities, any dispute arises between the parties, or the registrar is in doubt, he may sign a Judgment for Foreclosure with a Reference. As an alternative to obtaining from the registrar judgment for immediate payment, the plaintiff may, where a reference is desired, obtain judgment for the amount to be found due on the reference.
(11) Where, on the taking of the account or in determining priorities, any dispute arises between the parties, or the registrar is in doubt, he may sign judgment for foreclosure with a reference (Form 65B).	65.03(11) - Part of W. 65.01(6).	

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.03(12)
Conversion from Foreclosure to Sale (12) Where a defendant in a foreclosure action having an interest in the equity of redemption, other than as a subsequent encumbrancer, desires a sale, but does not desire to defend the action, he shall within the time prescribed for his defence deliver a request for sale (Form 65F), and the plaintiff may then require the registrar to sign judgment for sale (Form 65B, 65C or 65E).	65.03(12) - W. 65.01(7)(a), L.R.	(7) *May be Converted to a Sale* (a) Where a defendant in a foreclosure action having an interest in the equity of redemption, other than as a subsequent encumbrancer, desires a sale, but does not desire to defend the action, he may, within the time limited for defence, serve and file, with proof of service, a Request for Sale (Form 65F), and thereupon the plaintiff is entitled to obtain Judgment for Sale (Forms 65B, 65C or 65E as may be).
(13) Where a subsequent encumbrancer who is named as a defendant in the statement of claim in a foreclosure action desires a sale, but does not desire to defend the action or redeem the mortgaged property, he shall within the time prescribed for his defence pay into court the sum of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale and deliver a request for sale, together with particulars, verified by affidavit, of his claim to be entitled to a sale and the amount owing to him, and the plaintiff may require the registrar to sign judgment for sale (Form 65G) conditional on proof of the subsequent encumbrancer's claim.	65.03(13) - W. 65.01(7)(b), L.R.	(b) Where a defendant in a foreclosure action is a subsequent encumbrancer and desires a sale, but does not desire to defend the action or redeem the mortgaged property, he shall, within the time limited for defence, pay into court the sum of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale and serve and file, with proof of service, a Request for Sale, together with particulars of his claim verified by affidavit, and the plaintiff is entitled to obtain Conditional Judgment for Sale (Form 65G).

Revised Rules of Civil Procedure

(14) Where a subsequent encumbrancer added on a reference to the master desires a sale, he shall within ten days after service on him of notice of the reference pay into court the sum of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale and deliver a request for sale, and the master shall make an order amending the judgment from a judgment for foreclosure to a judgment for sale if the subsequent encumbrancer proves his claim on the reference.

(15) On the reference, the master may require the subsequent encumbrancer to pay an additional sum of money into court as security for costs or to meet the expenses of the sale.

Power of Master to Convert

(16) The master may on the motion of any party, either before or after judgment, direct a sale instead of foreclosure and may direct an immediate sale without previously determining the priorities of encumbrancers or giving the usual or any time to redeem.

(17) Where a foreclosure action has been converted into a sale action, the master may, on the motion of any party, either before or after judgment, direct foreclosure instead of a sale where it appears that the value of the property is unlikely to be sufficient to satisfy the claim of the plaintiff.

Comments

65.03(14)

- W. 65.01(7)(c), L.R.

65.03(15)

- W. 65.01(7)(d), L.R.

65.03(16)

- W. 65.01(8)(a), L.R.

65.03(17)

- W. 65.01(8)(b), L.R.

Williston's Proposed Rules

65.03(14)

(c) Where a subsequent encumbrancer added on a reference to the master desires a sale, he shall within 10 days from the date of the service upon him of notice of the reference pay into court the sume of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale and serve and file a Request for Sale and thereupon the master, on the return of the reference, shall make an order amending the judgment from a judgment for foreclosure to a judgment for sale; provided, however that no such order shall be made until after the subsequent encumbrancer requesting the sale has proved his claim to the satisfaction of the master.

(d) Where any subsequent encumbrancer has paid into court the sum of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale and has served and filed a Request for Sale, the master on the return of the reference may require him to pay an additional sum of money into court to meet the expenses of the sale.

(8) *Application to Convert*

(a) The master may on the motion of any party, either before or after judgment, direct a sale instead of a foreclosure and may direct an immediate sale without previously determining the priorities of encumbrancers or giving the usual or any time to redeem.

(b) Where a foreclosure action has been converted into a sale action, the master may, on the motion of any party, either before or after judgment, direct a foreclosure instead of a sale where it is made to appear that the value of the property is unlikely to be sufficient to satisfy the claim of the plaintiff.

REVISED RULES OF CIVIL PROCEDURE

Where Judgment for Sale Obtained in Foreclosure Action

(18) Where a judgment for sale has been obtained in a foreclosure action, a subsequent encumbrancer is entitled to notice of the hearing for directions on the reference for sale, whether or not he has filed a request to redeem the mortgaged property.

(19) Where the plaintiff wishes to transfer carriage of the sale to the defendant requesting the sale, he may do so by serving on the defendant and filing, with proof of service, notice of his election to transfer carriage of the sale, and the defendant then has carriage of the sale.

(20) The master shall deal with the security given under subrule (13), (14) or (15) in making his report.

COMMENTS

65.03(18) - (20)

- W. 65.02(6)(a) - (c), L.R. Working Group concluded these provisions (which in Williston were in the Sale Actions rule) belong here. Is this correct?

WILLISTON'S PROPOSED RULES

65.03(18)

(6) *Where Judgment for Sale Obtained in Foreclosure Action*

(a) Where a judgment for sale has been obtained in a foreclosure action, a subsequent encumbrancer, whether or not he has filed a Request to Redeem the mortgaged property, shall be entitled to notice of the first appointment on the reference in the sale action.

(b) If the plaintiff prefers that the sale be conducted by the defendant requesting the sale, he may so elect, and he shall serve upon such defendant and file, with proof of service, notice of such election, whereupon such defendant shall conduct the sale.

(c) The master shall deal with the deposit in making his report.

REVISED RULES OF CIVIL PROCEDURE

SALE ACTIONS

Persons to be Joined

65.04(1) In an action for sale, subsequent encumbrancers shall not be made defendants on the commencement of the action, but shall be added as parties on the reference to the master.

Request to Redeem

(2) Where a defendant in a sale action, other than a subsequent encumbrancer, wishes to redeem the mortgaged property, he shall deliver a request to redeem (Form 65A) within the time prescribed for his defence, whether or not he delivers a statement of defence.

(3) A defendant who is only a subsequent encumbrancer is not entitled to deliver a request to redeem.

COMMENTS

W. 65.02(1)

- Deleted because now covered by revised rule 65.02(2).

65.04(1)

- W. 65.02(2), L.R.

65.04(2)

- W. 65.02(3), L.R.

65.04(3)

- Part of W. 65.02(4)(b), L.R.

WILLISTON'S PROPOSED RULES

65.04(1)

65.02 Sales Actions

(2) *Persons to be Joined*

In an action for sale, subsequent encumbrancers shall not be made defendants on the commencement of the action, but shall be added as parties on the reference to the master.

(3) *Right to Redeem must be Requested*

Where the defendant in an action for sale requests the right to redeem the mortgaged property, he shall, within the time limited for his defence and, whether a Statement of Defence is delivered or not, file Request to Redeem.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.04(4)
Effect of Filing Request to Redeem (4) A defendant who has delivered a request to redeem is entitled to, (a) seven days notice of the taking of the account of the amount due to the plaintiff; and (b) three months from the date of the taking of the account of the amount due to the plaintiff within which to redeem the mortgaged property.	65.04(4) - W. 65.02(4), L.R.	(4) *Effect of Filing Request to Redeem* Any defendant who has filed a Request to Redeem shall be entitled to, (a) seven days notice of the taking of the account of the amount due to the plaintiff. (b) three calendar months from the date of the taking of the account of the amount due to the plaintiff within which to redeem the mortgaged property unless he is only a subsequent encumbrancers, in which case he shall not entitled to redeem.
Default Judgment (5) In a sale action, where the defendant has been noted in default and, (a) has not delivered a request to redeem, the plaintiff may require the registrar to sign judgment for immediate sale with a reference (Form 65H); or (b) has delivered a request to redeem, the plaintiff may require the registrar to sign judgment for sale with a reference (Form 65I).	65.04(5) - W. 65.02(5), L.R., and new. Williston made no provision re situations where defendant has defaulted but has filed a request to redeem.	(5) *Default Judgment* In an action for sale, where the defendant has been noted in default and has failed to file a Request to Redeem, the plaintiff may obtain Judgment for Immediate Sale with a Reference (Form 65H).

REVISED RULES OF CIVIL PROCEDURE

REDEMPTION ACTIONS

Claims that may be Joined

65.05(1) A person interested in the equity of redemption may, in an action for redemption, claim possession of the mortgaged property.

Persons to be Joined

(2) In a redemption action, all persons interested in the equity of redemption shall be made parties, either as plaintiffs or defendants.

(3) In a redemption action, subsequent encumbrancers shall not be made defendants unless the plaintiff is declared foreclosed.

Redemption by Encumbrancer Added on Reference

(4) Where a subsequent encumbrancer is made a defendant on a reference in a redemption action and proves a claim, he is entitled to redeem the mortgaged property within three months after the date of the taking of the account of the amount due to the plaintiff.[?]

COMMENTS

65.05(1)

- W. 65.03(1), L.R.

65.05(2)

- W. 65.03(2)(a), L.R.

65.05(3)

- W. 65.03(2)(b), part, L.R.

65.05(4)

- W. 65.03(2)(b), part, revised. Is the change from "usual period" to three months correct?

WILLISTON'S PROPOSED RULES

65.05(1)

65.03 Redemption Actions

(1) *What Claims may be Joined*

Any person interested in the equity of redemption may, in an action for redemption, claim possession of the mortgaged property.

(2) *Persons to be Joined*

(a) Where, in an action for redemption, more than one person is interested in the equity of redemption, they all must be made parties, either as plaintiffs or defendants.

(b) In an action for redemption, subsequent encumbrancers shall not be made defendants unless and until the plaintiff is declared foreclosed. If, upon the reference in an action for redemption, a subsequent encumbrancer is made a defendant and proves a claim, the usual period of redemption shall be granted.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.05(5)
Judgment (5) In a redemption action, where the defendant has been noted in default, the plaintiff may require the registrar to sign judgment for redemption (Form 65J).	65.05(5) - W. 65.03(3)(a).	(3) *Judgment* (a) In a redemption action, where the defendant has been noted in default, the plaintiff may require the registrar to sign Judgment for Redemption (Form 65 I).
(6) Every judgment for redemption shall direct a reference to the master whether or not there are any subsequent encumbrancers.	65.05(6) - W. 65.03(3)(b).	(b) Every judgment for redemption shall direct a reference to the master whether or not there are any subsequent encumbrancers.
PROCEDURE ON MORTGAGE REFERENCES GENERALLY 65.06(1) On a reference under a judgment for foreclosure, sale or redemption of a mortgaged property, the master shall determine who are subsequent encumbrancers.	65.06(1) - W. 65.04(1)(a), L.R.	65.04 Proceedings on the Reference (1) *Applicable to All Mortgage Actions* (a) Upon a reference pursuant to a judgment for foreclosure or sale or redemption of a mortgaged property, the master shall determine who has any lien, charge or encumbrance thereon subsequent to the mortgage in question.
(2) The plaintiff shall file with the master sufficient evidence to enable him to determine who appear to be subsequent encumbrancers.	65.06(2) - W. 65.04(1)(b), L.R.	(b) The plaintiff shall file with the master sufficient evidence to enable him to determine who appears to have any lien, charge or encumbrance upon the mortgaged property subsequent to the mortgage in question.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.06(3)
Adding Subsequent Encumbrancers (3) Subject to subrule 65.05(3) (subsequent encumbrancer in redemption action), the master shall direct all persons who appear to be subsequent encumbrancers and who were not made defendants on the commencement of the action to be made parties to the action and to be served with a notice of reference to subsequent encumbrancer added on reference (Form 65K).	65.06(3) - W. 65.04(1)(c), L.R.	(c) Subject to Rule 65.03(2)(b), the master shall direct all such persons as appear to have any lien, charge or encumbrance upon the mortgaged property subsequent to the mortgage in question who were not made defendants on the commencement of the action to be made parties to the action and to be served with Notice of Reference to Added Party having Encumbrance (Form 65J).
(4) A person served with a notice under subrule (3) may move within ten days after service to vary or set aside the order making him a party.	65.06(4) - W. 65.04(1)(d), L.R.	(d) Any person served with such notice may apply within 10 days from the date of the service to discharge, add to, vary or set aside the judgment or order making him a party.
(5) Where it appears to the master that a person who was made a defendant on the commencement of the action may be a subsequent encumbrancer, although he was not alleged to be a subsequent encumbrancer in the statement of claim, the master shall direct that defendant to be served with a notice of reference to subsequent encumbrancer joined as original party (Form 65L).	65.06(5) - W. 65.04(1)(e), L.R.	(e) Where it appears to the master that a person who was made a defendant on the commencement of the action, who has not been made a party to the action as a subsequent encumbrancer, may have some lien, charge or encumbrance upon the mortgaged property subsequent to the mortgage in question, the master shall direct such defendant to be served with Notice of Reference to Original Party having Encumbrance (Form 65K).

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.06(6)
Notice of Reference (6) Subject to subrule (8), all persons who were made defendants on the commencement of the action shall be served with a notice of mortgage reference (Form 65M), stating the names and nature of the claims of all those appearing to have a lien, charge or encumbrance on the mortgaged property.	65.06(6) - W. 65.04(1)(f), L.R.	(f) Subject to clauses (g) and (h) all persons who were made defendants on the commencement of the action shall be served with Notice of Reference to All Original Defendants (Form 65L), stating the names and nature of the claims of all those appearing to have a lien, charge or encumbrance upon the mortgaged property.
(7) Any person made a defendant on the commencement of the action who is not a subsequent encumbrancer and who has failed to file a request to redeem or a request for sale may be served with the notice of mortgage reference by mail addressed to him at his last known address.	65.06(7) - W. 65.04(1)(g), L.R.	(g) Any person made a defendant on the commencement of the action who is not a subsequent encumbrancer and has failed to file a Request to Redeem or a Request for Sale may be served with Notice of Reference to All Original Defendants by prepaid post addressed to him at his last known address.
(8) A subsequent encumbrancer who was made a defendant on the commencement of the action and who has failed to file a request to redeem or a request for sale is not entitled to any notice of the reference.	65.06(8) - W. 65.04(1)(h), L.R.	(h) Any subsequent encumbrancer who was made a defendant on the commencement of the action and has failed to file a Request to Redeem or a Request for Sale is not entitled to any notice of the reference.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		65.06(9)
Master's Duties on Reference (9) On the reference, the master shall, (a) take an account of what is due to the plaintiff and to any subsequent encumbrancer who has proved a claim and shall assess or fix their costs; (b) appoint a time and place for payment, unless the reference directed is for immediate sale, in which case the master shall proceed to give directions for the sale and defer the taking of an account until after the sale or an abortive sale; and (c) where a sale is being conducted on the request of a subsequent encumbrancer, satisfy himself that the subsequent encumbrancer has a valid claim before proceeding to give directions for the sale.	65.06(9) - W. 65.04(1)(i), L.R.	(i) On the reference, the master shall take an account of what is due to the plaintiff and to any subsequent encumbrancer who has proved a claim and shall tax or fix their costs and shall appoint a time and place for payment, unless the reference directed is for immediate sale, in which case the master shall proceed to give directions for the sale and defer the taking of an account until after the sale or an abortive sale. Where the sale is on the request of a subsequent encumbrancer, the master shall first satisfy himself that that subsequent encumbrancer has a valid claim.
(10) One day shall be fixed for redemption for all of the parties entitled to redeem and, where more than one party is entitled to redeem, the master shall determine the priority in which each is so entitled.	65.06(10) - W. 65.04(1)(j).	(j) One day shall be fixed for redemption for all of the parties entitled to redeem and, where more than one party is entitled to redeem, the master shall determine the priority in which each is so entitled.
(11) In an action for foreclosure or sale by, or for redemption against, an assignee of a mortgagee, the statement of the mortgage account, verified by affidavit of the assignee, is *prima facie* proof of the state of the account and an affidavit is not required from the mortgagee or any intermediate assignee denying any payment to the mortgagee or intermediate assignee, unless the mortgagor or his assignee, or any party entitled to redeem, denies by affidavit the correctness of the statement of account.	65.06(11) - W. 65.04(1)(k), L.R.	(k) On any proceeding for foreclosure or sale by, or for redemption against, an assignee of a mortgagee, the statement of the mortgage account, verified by affidavit of such assignee, shall be sufficient *prima facie* evidence of the state of such account and an affidavit shall not be required from the mortgagee or any intermediate assignee denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or any party entitled to redeem, denies by affidavit the correctness of such statement of account.

REVISED RULES OF CIVIL PROCEDURE

COMMENTS

WILLISTON'S PROPOSED RULES

65.06(12)

Master's Report

(12) The master shall set out in his report,

(a) the names of,

(i) all persons who have been parties in his office;

(ii) all subsequent encumbrancers who have been served with notice of the reference; and

(iii) all subsequent encumbrancers who failed to appear on the reference and prove their claim;

(b) the amount and priority of the claims of the parties who attended and proved their claims on the reference, and the report shall show those parties as the only encumbrancers on the property; and

(c) the date on which it is settled.

(13) Where any period fixed for redemption expires in less than fifteen days after confirmation of the report, a new account shall be taken.

65.06(12) & (13)

- W. 65.04(1)(l), L.R.

(l) The master in his report shall state the names of all persons who have been parties in his office, and all subsequent encumbrancers who have been served with notice of the reference and the names of such as have made default, and shall set forth the amount of the claims and the priorities of such as have attended and proved their claims who shall be certified as the only encumbrancers upon the property. The report shall bear the date upon which it is settled. Where any period fixed for redemption expires in less than 15 days after confirmation of the report, a new account shall be taken.

Mortgagee to Convey Property where Redeemed

(14) Subject to the *Mortgagees Act*, where a party pays the amount found due to the plaintiff, the plaintiff shall, unless the judgment directs otherwise, convey the mortgaged property to the party making the payment or his nominee, free and clear of all encumbrances incurred by the plaintiff, and the plaintiff shall deliver up all instruments in his possession or control that relate to the mortgaged property.

65.06(14)

- W. 65.04(1)(m), L.R.

(m) Subject to *The Mortgages Act*, upon payment of the amount found due, the mortgagee shall, unless the judgment otherwise directs, assign and convey the mortgaged property to the party making the payment, or to whom he may appoint, free and clear of all encumbrances incurred by the mortgagee and shall deliver up all deeds and writings in his custody or power relating thereto.

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(15) Where on a reference it appears that there are persons interested in the equity of redemption, other than subsequent encumbrancers, who are not already parties to the action, the master may order that they be made defendants on the reference on such terms as are just, and the order shall be served on the defendants added on the reference, together with the order of reference and a notice to added party (Form 65M).

(16) A defendant added under subrule (15) may move within ten days after service on him of the material referred to in subrule (15) to vary or set aside the judgment in the action or the order making him a party.

Mortgage Actions in County Court

(17) In mortgage actions in a county court, the clerk may conduct a reference directed by a default judgment and may take any accounts that are referred to him by a judge.

(18) Where the clerk is of the opinion that a mortgage reference directed by a default judgment ought to be dealt with by a judge, the clerk may move for directions.

Comments

65.06(15)

- W65.04(1)(o), L.R.

65.06(16)

- W65.04(1)(p), L.R.

65.06(17)

- W65.04(1)(q), part, L.R.

65.06(18)

- W65.04(1)(q), part, L.R.

Williston's Proposed Rules

65.06(15)

65.04(1)(o) Where on a reference it appears there are persons interested in the equity of redemption, other than subsequent encumbrancers, who are not already parties to the action, such persons may be made parties in the master's office upon such terms as may seem just and any such order shall direct a copy of the order, together with a copy of the judgment or order of reference and a Notice to Added Party (Form 65M) to be served on every such person.

65.04(1)(p) A person so served may apply within 10 days from the date of such service to discharge, add to, vary or set aside the judgment or the order making him a party.

65.04(1)(q) In mortgage actions in a county court, the clerk shall, subject to the directions of a judge, discharge all the duties and have all the powers of a registrar of the Supreme Court and may act as referee in any mortgage reference directed by a default judgment and in the taking of any accounts that may be referred to him by a judge. If it appears to the clerk that a mortgage reference directed by a default judgment is one which, in his opinion, ought to be dealt witb by a judge, the clerk may apply to a judge for directions.

Revised Rules of Civil Procedure

REFERENCES IN FORECLOSURE ACTIONS

Powers of Master on Reference

65.06(1) On a reference in a foreclosure action, the master shall take subsequent accounts, assess subsequent costs and take all necessary steps for redemption by or foreclosure of the other parties entitled to redeem the mortgaged property, as if specific directions for all those purposes had been contained in the judgment.

(2) Where more than one defendant entitled to redeem makes payment, any such defendant may make a motion on the reference for an order for further directions.

Foreclosure of Subsequent Encumbrancers

(3) Where a person who appears to be a subsequent encumbrancer has been served with a notice of reference under subrule 65.05(3), (5) or (6) and fails to attend and prove his claim on the reference, the master shall so report and, on confirmation of his report, the claim of any such party is foreclosed.

Final Order of Foreclosure

(4) Where no defendant other than a subsequent encumbrancer has delivered a statement of defence or filed a request to redeem, and where no subsequent encumbrancer has proved a claim on the reference, the master shall so report and, on confirmation of his report, a final order of foreclosure may be obtained on motion without notice.

Comments

Renumbering note

- Since the sub-committee directed the deletion of revised rule 65.01 at the December 1981 meeting, the following provisions of Rule 65 have been renumbered accordingly.

65.06(1)

- W65.04(2)(c), L.R. Would this provision not be equally applicable to sale and redemption actions? Should it be relocated as part of rule 65.05?

65.06(2)

- W65.04(2)(d), L.R. Should this also be part of rule 65.05?

65.06(3)

- W65.04(2)(a), L.R.

65.06(4)

- W65.04(2)(b), L.R.

Williston's Proposed Rules

MORTGAGE ACTIONS RULE 65

Applicable to Foreclosure Actions

(c) Subsequent accounts shall from time to time be taken, subsequent costs taxed, and necessary proceedings had, for redemption by or foreclosure of the other parties entitled to redeem the mortgaged property, as if specific directions for all those purposes had been contained in the judgment.

(d) Where more than one defendant entitled to redeem makes payment, any such defendant may apply to the master for an order for further directions, and thereupon sub-rule (2)(c) shall apply.

(a) Where a party appearing to have any lien, charge or encumbrance subsequent to the mortgage in question, has been served with a notice under sub-rule (1)(c), (1)(e) or (1)(f) and fails to attend and prove his claim at the time and place appointed, the master shall so report and, upon confirmation of his report, the claim of any such party shall be deemed to have been foreclosed.

(b) Where no defendant, other than a subsequent encumbrancer, has delivered a Statement of Defence or filed a Request to Redeem, and where no subsequent encumbrancer has proved a claim on the reference, the master shall so report; and, upon the confirmation of his report, a Final Order for Foreclosure may be obtained upon an application without notice.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES 65.06(5)
(5) On default of payment according to the report in a foreclosure action, a final order of foreclosure may be obtained on motion without notice against the party in default.	65.06(5) - W65.04(2)(f), L.R.	65.04(2)(f) In default of payment according to the report in a foreclosure action, a Final Order for Foreclosure may, on a motion without notice, be granted against the party in default.
Judgment for Redemption or Foreclosure (6) Where the judgment is for redemption and, in default of redemption, for foreclosure, the reference shall proceed in the same manner as in an action for foreclosure, and the last encumbrancer shall be treated as the owner of the equity of redemption.	65.06(6) - W65.04(2)(e), L.R. The Working Group has tried to make the provision more comprehensible. Did we get it right?	65.04(2)(e) Where the judgment is for redemption or foreclosure, such proceedings are to be taken, and with the same effect as in an action for foreclosure, and in such case the last encumbrancer shall be treated as the owner of the equity of redemption.
REFERENCES IN SALE ACTIONS *Redemption* 65.07(1) In a sale action, a defendant other than a subsequent encumbrancer who has an interest in the equity of redemption and who has filed a request to redeem may redeem the mortgaged property on paying the amount found due to the plaintiff and his costs.	65.07(1) - W65.04(3)(b), L.R. Does this properly belong in a rule relating to references, or would it fit better in the sale actions rule, now 65.03?	65.04 (3) *Applicable to Sale Actions* 65.04(3)(b) In a sale action, any defendant having an interest in the equity of redemption, other than a subsequent encumbrancer, who has filed a Request to Redeem shall be entitled to redeem and, in order to redeem, he shall be required to pay the amount found due to the plaintiff and his costs.
Order for Sale (2) Where no defendant other than a subsequent encumbrancer has delivered a statement of defence or filed a request to redeem and where no subsequent encumbrancer has proved a claim on the reference, the master shall so report and, on confirmation of his report, a final order for sale (Form 650) may be obtained on motion without notice.	65.07(2) - W65.04(3)(a), L.R.	65.04(3)(a) Where no defendant, other than a subsequent encumbrancer, has delivered a Statement of Defence or filed a Request to Redeem and where no subsequent encumbrancer has proved a claim on the reference, the master shall so report; and, upon the confirmation of his report, a Final Order of Sale (Form 650) may be obtained upon a motion without notice.

Revised Rules of Civil Procedure

(3) Where a judgment directs a sale on default of payment and default has occurred, an order for sale may be obtained on motion without notice.

Purchase Money

(4) Where an order for sale has been obtained, the poroperty shall be sold with the approval of the master, and the purchaser shall pay his purchase money into court unless the master directs otherwise.

(5) The purchase money shall be applied in payment of what has been found due to the plaintiff and the other encumbrancers, if any, according to their priorities, together with subsequent interest and subsequent costs.

(6) Where the purchase money is not sufficient to pay what has been found due to the plaintiff, the plaintiff is entitled, on motion without notice, to an order for payment of the deficiency by any defendant liable for the mortgage debt.

Judgment for Redemption or Sale

(7) Where the judgment is for redemption and, in default of redemption, for sale, the reference shall proceed in the same manner as in an action for sale, and the last encumbrancer shall be treated as the owner of the equity of redemption.

Comments

65.07(3)

- W65.04(3)(c), L.R.

65.07(4)

- W65.04(3)(d), L.R.

65.07(5)

- W65.04(3)(e), L.R.

65.07(6)

- W65.04(3)(f), L.R.

65.07(7)

- W65.04(3)(g), L.R. Again, the Working Group has tried to make the provision more comprehensible. Is it right?

Williston's Proposed Rules

65.07(3)

65.04(3)(c) If a judgment directs a sale on default in payment, then an order for sale may be obtained on a motion without notice.

65.04(3)(d) Upon a judgment or order for sale being obtained, the property shall be sold with the approbation of the master, and the purchaser shall pay his purchase money into court unless otherwise directed by the master.

65.04(3)(e) When so paid, the purchase money shall be applied in payment of what has been found due to the plaintiff and the other encumbrancers, if any, according to their priorities, together with subsequent interest and subsequent costs.

65.04(3)(f) Where the purchase money is not sufficient to pay what bas been found due to the plaintiff, the plaintiff is entitled, on a motion made without notice, to an order for payment of the deficiency by any defendant liable for the mortgage debt.

65.04(3)(g) Where the judgment is for redemption or sale, such proceedings are to be taken, and with the same effect as in an action for sale, and in such case the last encumbrancer shall be treated as the owner of the equity for redemption.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
REFERENCES IN REDEMPTION ACTIONS		65.08(1)
65.08(1) On a reference under a judgment for redemption, the master shall take an account of what is due to the defendant, including costs, if any, and shall name a time and place for payment.	65.08(1) - W65.04(4)(a), L.R.	65.04 (4) *Applicable to Redemption Actions* 65.04(4)(a) Upon a reference under a judgment for redemption, the master shall take an account of what is due to the defendant, including costs, if any, and shall appoint a time and place for payment.
(2) On default of payment according to the report in a redemption action, the defendant is entitled, on motion without notice, to a final order of foreclosure against the plaintiff or to an order dismissing the action with costs.	65.08(2) - W65.04(4)(b), L.R.	65.04(4)(b) In a redemption action, on defaulf of payment being made according to the report, the defendant is entitled, upon a motion without notice, to a final order of foreclosure against the plaintiff or to an order dismissing the action with costs to be paid by the plaintiff.
(3) Where the plaintiff is declared foreclosed, directions may be given, either by the final order foreclosing the plaintiff or by subsequent orders, that a reference be conducted for redemption or foreclosure, or for redemption or sale, as against any subsequent encumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves.	65.08(3) - W65.04(4)(c), L.R.	65.04(4)(c) In a redemption action where the plaintiff is declared foreclosed, directions may be given, either by the final order foreclosing the plaintiff or by subsequent orders, that all necessary inquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent encumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves.
CHANGE OF ACCOUNT		
65.09(1) Where the state of account as ascertained by an order or report has changed before the day named for payment, the mortgagee may, at least fifteen days before that day, give notice of the change of account to the person required to pay, giving particulars of the change of account and of the sum to be paid.	65.09(1) - W65.05(1), L.R.	65.05 Where There has been a Change of Account (1) Where the state of account as ascertained by a judgment, order or report is changed before the day appointed for payment, the mortgagee may, at least 15 days before the day appointed, give notice of the change of account to the person called upon to pay, giving particulars of the change of account and of the sum to be paid.

Revised Rules of Civil Procedure

(2) Where notice of change of account has been given and the sums mentioned in it are proper, the master may grant a final order without further notice or, on the motion for a final order, may in his discretion require notice to be given and may name a new day for payment.

(3) Where a party to whom notice of change of account is given is dissatisfied, he may make a motion to the master to determine the amount to be paid and to name a new day for payment.

(4) Where the state of account has changed before the day named for payment and notice of the change has not been given,

(a) where the amount payable for redemption has reduced, a new day shall be named for payment on notice to the persons entitled to redeem; or

(b) where the amount payable for redemption has increased, the mortgagee may move for a final order without the naming of a new day.

(5) Where the state of the account has changed after the day named for payment, it is not necessary to name a new day, unless the master on the motion for a final order so directs.

(6) Where it becomes necessary to name a new day for redemption after the expiration of the original period, the further time allowed shall be one month, unless otherwise ordered.

Comments

65.09(2)

- W65.05(2), L.R.

65.09(3)

- W65.05(3), L.R.

65.09(4)

- W65.05(4), L.R. and split into clauses.

65.09(5)

- W65.05(5), L.R.

65.09(6)

- W65.05(6), L.R. The reference to the intiial period for redemption being three months (now ninety days) has been deleted, because the ninety day period is clearly set out in the rules relating to foreclosure and sale actions.

Williston's Proposed Rules

65.09(2)

65.05 (2) If notice of change of account has been given and the sums therein mentioned appear properly to be allowed or paid, a final order may be granted without further notice or the master, on the motion for a final order, may in his discretion require notice to be given and may fix a new day.

65.05 (3) If any party to whom notice of change of account is given is dissatisfied, he may apply to the master to determine the amount to be paid and to fix a new day.

65.05 (4) If the state of account has been changed before the day appointed for payment and no such notice has been given and the amount payable for redemption is reduced, a new day shall be appointed for payment upon notice to the persons entitled to redeem but, if the amount payable has been increased, the mortgagee may apply for a final order without the appointment of a new day.

65.05 (5) If the state of the account has been changed after the day appointed for payment, it is not necessary to appoint a new day, unless the master on the motion for a final order so directs.

65.05 (6) In mortgage actions, the initial period allowed for redemption shall be three months, and when it becomes necessary to fix a new day for redemption after the lapse of the original period, the further time allowed shall be one month, unless otherwise ordered

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES 65.09(7)
(7) Notwithstanding subrule (6), the court may, on the motion of any party, extend or abridge the time for redemption for such length of time and on such terms as are just.	65.09(7) - W65.05(7), L.R.	65.05(7) Notwithstanding the preceding paragraph, the court may, on the motion of any party, extend or abridge the time redemption from time to time for such length of time and upon such terms as may seem just.

PARTICULAR PROCEEDINGS

RULE 66 PROCEEDINGS FOR ADMINISTRATION

WHERE AVAILABLE

66.01(1) A proceeding for the administration of the estate of a deceased person or for the execution of a trust may be commenced by notice of application,

(a) by a person claiming to be a creditor of the estate of the deceased person;

(b) by a person claiming to be a beneficiary under the will or on the intestacy of the deceased or under the instrument of trust; or

(c) by an executor or administrator of the deceased or a trustee.

(2) An order for the administration of an estate or for the execution of a trust may be refused if the judge is satisfied that the questions between the parties can be properly determined without the order.

(3) Where no accounts or insufficient accounts have been rendered, the judge may, instead of making an order for administration of the estate or for the execution of the trust, order that the executors, administrators or trustees render to the applicant a proper statement of their accounts and may stay the application in the meantime.

RULE 66 PROCEEDINGS FOR ADMINISTRATION

66.01(1)

- W66.01(1) and (2), L.R.

66.01(2)

- W66.01(3), L.R.

66.01(3)

- W66.01(4), L.R.

66.01

RULE 66 PROCEEDINGS FOR ADMINISTRATION

66.01 Where Available

(1) A proceeding for the administration of the estate of a deceased person or for the execution of a trust may be commenced by a Notice of Application by any person claiming to be a creditor or beneficiary under the will or on the intestacy of the deceased or under any instrument of trust.

66.01 (2) Such a proceeding may also be commenced by an executor or administrator of the deceased or by a trustee.

66.01 (3) A judgment for the administration of any estate or for the execution of a trust may be refused if the judge is satisfied that the questions between the parties can be properly determined without such judgment.

66.01 (4) Where no accounts or insufficient accounts have been rendered, the judge may, instead of granting judgment for administration of the estate or for the execution of a trust, order that the executors, administrators or trustees render to the applicant a proper statement of their accounts and stay the proceeding in the meantime.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules 66.03(4)
(4) All money realized from the estate shall forthwith be paid into court, and no money shall be distributed or paid out for costs or otherwise, except by order of a judge.	66.03(4) - W66.03(4). Compare this with the revised Rule 75.	66.03 (4) All money realized from the estate shall forthwith be paid into court, and no money shall be distributed or paid out for costs or otherwise, except by order of a judge.
(5) On a motion for an order for distribution, the judge may review, amend or refer back the report or make such other order as is just.	66.03(5) - W66.03(5), L.R.	66.03(5) On a motion for an order for distribution, the judge may review, amend or refer back the report or make such other order as may seem just.

REVISED RULES OF CIVIL PROCEDURE

RULE 67 PARTITION PROCEEDINGS

WHERE AVAILABLE

67.01(1) A proceeding for partition of an interest in land may be commenced by notice of application by any person not under disability who is entitled to compel partition.

(2) A proceeding for partition on behalf of a person under disability may be commenced by his litigation guardian only with leave of a judge.

WHERE A PERSON UNDER DISABILITY IS INTERESTED

67.02 A judgment for partition or sale of an interest in which a person under disability is interested shall not be granted unless the provisions of Rule 7 (parties under disability) are complied with.

WHERE A REFERENCE IS DIRECTED

67.03(1) Where a judgment for partition or sale (Form 67A) of an interest in land directs a reference, the person to whom the reference is directed shall, subject to this rule, conduct the reference in accordance with Rule 57 (procedure on a reference).

(2) The person conducting the reference has the power to add any necessary parties, to ascertain the rights of the parties interested and to assess the costs of the parties.

COMMENTS

RULE 67 PARTITION PROCEEDINGS

67.01(1)

- W67.01(1), L.R. to make the language parallel with 66.01.

67.01(2)

- W67.01(2), L.R. Present rule 623 speaks of the "sanction" of a judge, which appears to be the same thing as leave. This provision dates back to a section of the Partition Act in the late 19th century. The provision was repealed when the rules were enacted in 1913. The requirement of notice to the Official Guardian has been dropped here, although it is retained in rule 68.01 If the OG is notified of an application commenced by a litigation guardian, why is leave of a judge needed?

67.02

- W67.02, L.R.

67.03(1)

- W67.03(1), L.R.

67.03(2)

- W67.03(2), L.R.

WILLISTON'S PROPOSED RULES

67.01

RULE 67 PARTITION PROCEEDINGS

67.01 Where Available

(1) Any person, not under disability, entitled to compel the partition of land or any estate or interest therein may, by Notice of Application, apply for partition or sale.

67.01 (2) A proceeding for partition on behalf of a person under disability may only be commenced by his litigation guardian and with leave of a judge.

67.02 Where a Person under Disability is Interested

A judgment for partition or sale of land or any estate or interest therein in which a person under disability is interested shall not be made unless the provisions of Rule 7 have been complied with.

67.03 Where a Reference is Directed

(1) Where a Judgment for Partition or Sale (Form 67A) of land or an estate or interest therein directs a reference, the person to whom the reference is directed shall, subject to this rule, proceed to conduct the reference in accordance with the procedure prescribed by Rule 57.

67.03 (2) On any such reference, the person to whom a reference is directed shall have the power to add any necessary parties, to ascertain the rights of the various parties interested and to tax the costs of any such parties.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules 67.03(3)
(3) All money realized from a sale of an interest in the land shall forthwith be paid into court, and no money shall be distributed or paid out for costs or otherwise, except by order of a judge.	67.03(3) - W67.03(3), L.R. Compare with revised Rule 75.	67.03(3) All money realized from a sale of the land or any estate or interest therein shall forthwith be paid into court, and no money shall be distributed or paid out for costs or otherwise, except by order of a judge.
(4) On a motion for an order for distribution, the judge may review, amend or refer back the report or make such other order as is just.	67.03(4) - W67.03(4), L.R.	67.03(4) On a motion for an order for distribution, the judge may review, amend or refer back the report or make such other order as may seem just.

RULE 68 PROCEEDINGS CONCERNING THE ESTATES OF MINORS

HOW COMMENCED

68.01 A proceeding for approval of the sale, mortgage, lease or other disposition of real or personal property of a minor may be commenced by notice of application on notice to the Official Guardian.

AFFIDAVIT IN SUPPORT

68.02(1) The affidavit in support of the application shall state the nature and amount of the real and personal property to which the minor is entitled.

(2) Where the application is for approval of the sale, mortgage, lease or other disposition of real property, the affidavit shall show the nature and value of the real property to be disposed of, the annual profits from it and the present occupation of it, and well as the facts relied on to establish the necessity for the proposed disposition.

(3) Where an allowance for maintenance of the minor is desired, the affidavit shall state the amount required and the facts relied on to establish the need for the allowance and, where applicable, shall show the necessity for resorting to the property to provide the allowance.

(4) Where the appointment of a guardian is desired, the affidavit shall state the reasons for the appointment and the facts relied on to justify the appointment of the person proposed.

RULE 68 PROCEEDINGS CONCERNING THE ESTATES OF MINORS

68.01

- W68.01, L.R. At Lloyd Perry's suggestion, the rule makes it clear that it applies to personal property.

68.02(1)

- W68.02(1), L.R.

68.02(2)

- W68.02(2), L.R.

68.02(3)

- W68.02(3), L.R.

68.

- R.

RULE 68 PROCEEDINGS CONCERNING THE ESTATES OF MINORS

01 How Commenced

A proceeding for approval of the sale, mortgage, lease or other disposition of the whole or any part of the estate of a minor may be commenced by a Notice of Application, nd shall be made to a judge upon notice to the Official uardian.

68.02 Affidavit in Support

(1) The affidavit in support of any such proceeding shall state the nature and amount of the real and personal property to which the minor is entitled.

68.02 (2) If the proceeding is for approval of the sale, mortgage, lease or other disposition of real property, the affidavit shall show the nature and value of the real property to be disposed of, the annual profits therefrom and the present occupation thereof, as well as the facts relied upon to establish the necessity for the proposed disposition.

68.02 (3) If an allowance for maintenance is desired, the affidavit shall state the amount required and the facts relied upon to establish the need for such an allowance and, where applicable, shall show the necessity for resorting to the real property to provide such an allowance.

68.02 (4) If the appointment of a guardian is desired, the affidavit shall state the reason therefor and the facts relied upon to justify the appointment of the person proposed.

Revised Rules of Civil Procedure

WHERE CONSENT REQUIRED

68.03(1) Approval for the sale, mortgage, lease or other disposition of property of a minor over the age of sixteen years shall not be given unless the consent of the minor has been filed, but the consent may be dispensed with by the judge.

(2) When so directed by the judge, the minor shall be produced before him or before a master and shall be examined in private [?] as to his consent.

(3) Where the minor is outside Ontario, the judge may direct an inquiry to be made as to the consent of the minor in such manner as is just.

Comments

68.03(1)

- W68.03(1), L.R. The need for a provision to dispense with the consent of a minor who cannot be found is clear, but the Working Group considers that the power to dispense should be in the judge, not the Official Guardian.

68.03(2)

- W68.03(2), L.R. "Examined apart" sounds like a form of torture.

68.03(3)

- W68.03(3), L.R.

Williston's Proposed Rules

68.03 Where Consent Required

(1) Approval for the sale, mortgage, lease or other disposition of the whole or any part of the estate of a minor shall not be given unless the consent of any minor over the age of 16 years has been filed; but any such consent may be dispensed with if the Official Guardian does not object.

69.03 (2) When so directed by the judge, the minor shall be produced before him or before a master and shall be examined apart as to his consent.

68.03(3) Where the minor is out of Ontario, the judge may direct an inquiry to be made as to the consent of the minor in such manner as may seem just.

RULE 69 - PROCEEDINGS FOR JUDICIAL REVIEW

HOW COMMENCED

69.01(1) An application to the Divisional Court or the High Court for judicial review under the *Judicial Review Procedure Act* shall be commenced by notice of application.

(2) Where the application is to the Divisional Court, the registrar in the office where the application is commenced shall forthwith send the court file to the office of the Divisional Court at Toronto, and all subsequent documents in the application shall be filed there.

APPLICATIONS IN DIVISIONAL COURT

69.02 Rules 69.03 to 69.06 apply to applications for judicial review in the Divisional Court.

HEARING DATE IN DIVISIONAL COURT

69.03 The notice of application shall state that the application is to be heard on a date to be fixed by the Registrar of the Divisional Court, unless a hearing date is obtained from him before the notice of application is issued.

RULE 69 PROCEEDINGS FOR JUDICIAL REVIEW

This rule is entirely new. It was developed by the Working Group from proposals by Tony Bridges and Julian Polika of the Crown Law Office. It is an attempt to provide a minimal framework for judicial review applications, based on large part on Rule 38, with some borrowings from Rule 62. It is meant to supplement the provisions of Rule 38 for judicial review applications in the Divisional Court. Judicial review applications brought before a single judge of the Supreme Court are to be governed entirely by Rule 38.

Note that under revised rule 69.01(2) it will still be possible to commence a judicial review in any court office, but the papers will immediately be sent to the Divisional Court office at Toronto.

Rule 69.03 sets the time periods for filing application records by reference to whether or not a record of the tribunal being reviewed is necessary.

RULE 69 PROCEEDINGS FOR JUDICIAL REVIEW

69.01 How Commenced

(1) A proceeding for judicial review under *The Judicial Review Procedure Act, 1971*, may be commenced by a Notice of Application and, subject to paragraph (2), shall be made to the Divisional Court.

69.01 (2) A proceeding for judicial review may be made to the High Court with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for having the application heard by the Divisional Court is likely to involve a failure of justice.

69.01 (3) Where a judge of the High Court refuses leave for a proceeding under paragraph (2), he may order that the proceeding be transferred to the Divisional Court.

69.02 Interim Order

On any proceeding for judicial review, a judge of the High Court may make such interim order as he considers proper, pending the final determination of the proceeding.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		69.04
APPLICATION RECORD 69.04(1) The applicant shall deliver the application record required by subrule 38.08(1), (a) where the nature of the application requires the tribunal whose decision is to be reviewed to file a record of the proceeding before it, not later than thirty days after the record is filed with the registrar of the Divisional Court; (b) where the nature of the application does not require a record from of the tribunal whose decision is to be reviewed, not later than thirty days after the application was commenced; or (c) not later than three days before the hearing, whichever is the earliest. (2) The respondent shall deliver the application record required by subrule 38.08(2) not later than thirty days after service on him of the applicant's application record or not later than 4 p.m. on the day before the hearing, whichever is the earlier. (3) The parties shall file three copies of their application record for the use of the court.		
CERTIFICATE OF PERFECTION 69.05(1) The applicant shall file with the application record a certificate of perfection stating that all the material required to be filed by the applicant for the hearing of the application has been filed and setting out the name and address of every person who is not a party and is entitled to be heard on the application.	Rules 69.04 and 69.05 are parellel to the new provisions for appeals, in accordance with the sub-committee's instructions given at the December 1981 meeting.	

(2) When the certificate of perfection has been filed, the registrar shall put the application on a list for hearing and give notice of hearing (Form 62__) by mail to the parties and the other persons named in the certificate of perfection.

DISMISSAL FOR DELAY

Motion by Respondent

69.06(1) Where the applicant has not delivered an application record within thirty days after the application was commenced, the respondent may give the applicant ten days notice of a motion to the Registrar of the Divisional Court to dismiss the application for delay, and where the applicant does not deliver an application record within the ten days or such further time as a judge allows, the Registrar may dismiss the application for delay, with costs to be assessed.

On Notice by Registrar

(2) The Registrar of the Divisional Court may on his own initiative take steps under subrules (3) and (4) to dismiss an application for delay where the applicant has not filed an application record within one year after the application was commenced.

(3) Where the Registrar proposes to dismiss an application for delay, he shall give notice to the parties that the application will be dismissed for delay unless the applicant delivers an application record within ten days after service of the notice.

(4) Where the applicant does not deliver an application record within the ten days or such further time as a judge allows, the Registrar shall dismiss the application for delay, with costs to be assessed.

RULE 70 PROCEEDINGS FOR QUIETING TITLES

70.01 How Commenced

(1) A proceeding under either Section 2 or Section 30 of *The Quieting Titles Act* shall be commenced by petition in the form prescribed by the Act, and shall be made to a judge of the High Court.

(2) No petition shall include two or more properties dependent on separate and distinct titles, but a petition may include any number of lands or parcels belonging to the same person and dependent on one and the same chain of title.

(3) Every petition under the Act shall be filed in the office of the local registrar at Toronto and may, at the option of the petitioner, be referred to the referee in Toronto or to any local referee.

(4) Where a petitioner desires to have the petition referred to a particular local referee, he shall endorse the petition accordingly.

(5) Where a petition is filed with no endorsement, it shall stand referred to the referee in Toronto, but a petition endorsed to a local referee shall stand referred to him.

(6) The Senior Master is the sole inspector of titles in respect of petitions filed under the Act and the sole referee in Toronto, but he may assign to any master such duties as inspector or referee as he from time to time deems advisable.

(7) Upon the filing of the petition, the local registrar at Toronto shall attend upon one of the judges of the High Court, designated by the Chief Justice of the High Court to hear petitions under the Act, for directions before it is referred to a referee for investigation.

(8) Subject to the directions of the judge, the local registrar at Toronto shall transmit the petition to the referee but, where the petition is referred to a local referee, a copy of the petition shall be filed with the inspector of titles before it is transmitted to the local referee.

RULE 70 PROCEEDINGS FOR QUIETING TITLES

The Ministries of the Attorney General and Consumer and Commercial Relations are agreed that the Quieting Titles Act will be repealed in its entirety. Rule 70 should accordingly be deleted.

70.02 Material in Support

(1) The particulars necessary under the Act to support the petition shall be delivered or mailed by the petitioner or his solicitor to the referee.

(2) The petitioner shall deliver to the referree a plan and description of the property, verified by the affidavit of a qualified land surveyor who has personally inspected the property, and the affidavit shall state the manner in which the land described is indicated upon the plan, the names of the person or persons in actual occupation of the whole or any part thereof, the nature of the buildings upon the property and any evidence of continued possession that might be of assistance in the consideration of the petition.

(3) The petitioner shall also show, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise, or shall show some sufficient reason for dispensing with such proof either wholly or in part.

70.03 Attendance of Petitioner

Where there is no contest, the attendance of the petitioner, or his solicitor, shall not be required on the examination of the title, except where, for any special reason, the referee directs such attendance.

70.04 Where Proof of Title is Defective

If, on such examination, the referee finds the proof of title defective, he shall deliver or mail to the petitioner, or his solicitor, a memorandum of such finding, stating shortly therein what the defects are, and he shall therein state as far as possible all the objections to the title.

70.05 Where Good Title is Shown

(1) Where the referee finds that a good title is shown, he shall prepare the necessary advertisement and, unless the publication thereof is dispensed with under the Act, the advertisement shall be published in a newspaper having a general circulation in the county where the land is situate and in any other newspaper in which the referee thinks it proper to have it inserted.

(2) The referee shall endorse on the advertisement so prepared by him the name of the newspaper or newspapers in which it is to be published, and the number of insertions to be given therein respectively.

(3) Any notice of the petition to be mailed or served under Section 13 of the Act shall be prepared by the referee, and directions shall be given by him as to the persons on whom it is to be served.

70.06 Where Local Referee is Satisfied

(1) Where, in the opinion of a local referee, the petitioner is entitled to a certificate or conveyance under the Act and has published and given all notices required, the local referee shall endorse and sign at the foot of the petition the following memorandum: "I am of the opinion that the petitioner is entitled to a certificate of title (or conveyance) as claimed (or subject to the following encumbrances, etc., as the case may be)."

(2) The local referee shall thereupon transmit to the inspector of titles the petition and all papers relating thereto.

(3) The inspector of titles shall thereupon examine the papers carefully and, if he finds any defect in the evidence of title or in the proceedings, he shall, by correspondence or otherwise, point out the defect to the petitioner or his solicitor, or to the local referee, as the case may be, in order that the defect may be remedied before the petition and all papers relating thereto are tranmitted to the judge for approval.

70.07 Where Inspector of Titles or Referee at Toronto is Satisfied

(1) Where the inspector of titles or referee at Toronto finds that the petitioner is entitled to a certificate of title or a conveyance under the Act and has published and given all the notices required, the inspector of titles or referee at Toronto shall endorse and sign at the foot of the petition a memorandum to the same effect as is required from a local referee.

(2) The inspector of titles or referee at Toronto shall thereupon prepare the certificate of title or conveyance, engross and sign the same in triplicate and shall attend upon the judge therewith and with the petition and all papers relating thereto.

(3) On the certificate or conveyance being signed by the judge, the inspector of titles or referee at Toronto shall deliver or transmit the certificate of title or conveyance to the local registrar at Toronto to be sealed and registered.

(4) The local registrar shall thereupon retain one of the signed certificates or conveyances and shall deliver or transmit the other two, when so sealed and registered, to the petitioner or his solicitor.

(5) Unless the judge otherwise directs, the certificate of title or conveyance shall be dated as of the date of the filing of the petition.

(6) When a certificate of title or conveyance has been granted, the inspector of titles or referee at Toronto may, without further order, deliver on demand to the party entitled thereto, or his solicitor, all deeds and other documents of title filed in connection with the proceeding and shall take his receipt therefor.

70.08 Appeal

The certificate of the inspector of titles or of a referee upon any contest before him shall be filed, and an appeal lies therefrom in the same way as from a report on a reference.

70.09 Alternative Proceeding by Notice of Application

(1) Where any person claims to be the owner of land, he may have any particular question that would arise upon a petition under *The Quieting Titles Act* determined in a proceeding commenced by a Notice of Application.

(2) Notice of any such application shall be given to all persons to whom notice would be given under *The Quieting Titles Act*, and the judge has the same power to determine and finally dispose of such particular question as he would have under that Act. It shall not, however, be necessary to comply with the provisions of sub-rule 70.05.

REVISED RULES OF CIVIL PROCEDURE

RULE 71 MENTAL INCOMPETENCY PROCEEDINGS

REMOVAL TO SUPREME COURT

71.01(1) Where the respondent in a proceeding under the *Mental Incompetency Act* requires the proceeding to be removed into the Supreme Court, he shall serve a notice of removal (Form 71A) on the applicant and file it with proof of service, with the clerk of the county court in which the proceeding was brought, at least two days before the hearing date of the application.

(2) On filing the notice of removal with proof of service, the clerk of the county court shall forthwith transmit the papers to the local registrar of the Supreme Court in the county in which the proceeding was commenced.

(3) Within ten days after service on him of the notice of removal, the applicant shall serve on the respondent and file a notice of the time and place of the hearing of the proceeding before a judge of the Supreme Court.

APPLICATION FOR CONFIRMATION

71.02(1) Where an order has been made by a judge of a county court appointing a permanent committee or propounding a scheme of management or propounding a subsequent scheme not previously confirmed by a judge of the Supreme Court, the order shall be issued and filed with the clerk of the county court.

COMMENTS

RULE 71 MENTAL INCOMPETENCY PROCEEDINGS

71.01(1)

- W71.01(1), L.R.

71.01(2)

- W71.01(2).

71.01(3)

- W71.01(3), L.R. The concluding words from Williston were deleted because there is no difference between the procedure of the Supreme Court and the procedure of a county court.

71.02

- W71.02, L.R. The Ministry of the Attorney General and the Ministry of Health are considering whether the provisions in the Act for review by a Supreme Court judge of a scheme of management approved by a county court judge should be repealed. Solicitors outside Toronto complain about this requirement. If it is to be retained, Rule 37 must be amended to prohibit local judges from hearing motions for confirmation, as it would be irrational to have a scheme approved by a county judge reviewed on motion to a local judge who is another county judge. It is hoped that rule 71.02 will no longer be necessary.

WILLISTON'S PROPOSED RULES

71.01

RULE 71 MENTAL INCOMPETENCY PROCEEDINGS

71.01 Removal to Supreme Court

(1) Where the respondent in a proceeding under *The Mental Incompetency Act* requires the proceeding to be removed into the Supreme Court, he shall serve a Notice of Removal (Form 71A) upon the applicant and file the same, with proof of service, with the clerk of the county court in which the proceeding was brought, at least 2 days before the return date of the application for the declaration of mental incompetency or incapacity.

71.01 (2) Upon filing the Notice of Removal and proof of service thereof, the clerk of the county court shall forthwith transmit the papers to the local registrar of the Supreme Court in the county in which the proceeding was brought.

71.01(3) Within 10 days of service upon him of the Notice of Removal, the applicant shall serve upon the respondent and file a notice of the time and place of the hearing of the proceeding before a judge of the Supreme Court and thereafter the practice and procedure of the Supreme Court shall apply to the proceeding.

71.02 Application for Confirmation

(1) Where an order has been made by a judge of a county court appointing a permanent committee or propounding a scheme of management or propounding a subsequent scheme not previously confirmed by a judge of the Supreme Court, the order shall be issued and filed with the clerk of the said county court.

REVISED RULES OF CIVIL PROCEDURE

(2) Unless the order has been appealed, the applicant shall file with the clerk of the county court a notice of motion to a judge of the Supreme Court at Toronto for an order confirming the appointment of the committee and the scheme of management, and the clerk shall send the notice of motion, the order and all other papers filed in the proceeding to the local registrar of the Supreme Court at Toronto.

(3) The notice of motion for confirmation shall be filed with the clerk of the county court at least ten days before the hearing date named in the notice.

(4) On receipt of the notice of motion and supporting material, the local registrar at Toronto shall place the motion on the appropriate list, and counsel need not appear in the first instance.

(5) The order shall be considered by the presiding judge and if, in his opinion, it is proper to confirm the appointment of the committee and the scheme of management, he shall confirm it by so endorsing the notice of motion and an order, prepared by the solicitor for the applicant, shall be issued and entered in the Supreme Court at Toronto, and a copy shall be filed with the clerk of the county court in which the proceeding was commenced.

COMMENTS

WILLISTON'S PROPOSED RULES 545

71.02(2)

71.02 (2) Unless the order has been appealed, the applicant shall file with the clerk of the said county court a notice of motion returnable before a judge of the High Court at Toronto for an order confirming the appointment of the committee and the scheme of management, and the clerk shall thereupon transmit the notice of motion, the order and all other papers filed in the proceeding to the local registrar of the Supreme Court at Toronto.

71.02 (3) The notice of motion for confirmation shall be filed with the clerk of the said county court at least 10 days prior to the day upon which the motion is returnable.

71.02 (4) Upon receipt of the notice of motion and supporting material, the local registrar at Toronto shall place the motion on the appropriate list, and it shall not be necessary for counsel to appear in the first instance.

71.02 (5) The order shall be considered by the presiding judge and if, in his opinion, it is proper to confirm the appointment of the committee and the scheme of management, he shall confirm the same by so endorsing the notice of motion and an order, prepared by the solicitor for the applicant, shall be issued and entered in the Supreme Court at Toronto, and a copy thereof shall be filed with the clerk of the county court in which the proceeding was commenced.

REVISED RULES OF CIVIL PROCEDURE

(6) Where the presiding judge is not satisfied, he shall state shortly his reasons in writing and either direct an amendment to be made before an order is issued or adjourn the motion and direct the local registrar at Toronto to give notice to the applicant of the adjourned hearing, at which counsel shall appear.

PASSING ACCOUNTS

71.03(1) On the death of a person who has been found mentally incompetent or mentally incapable under the provisions of the *Mental Incompetency Act*, the accounts of his committee shall be passed by a judge of the county court in which the proceeding is pending, on notice to his executor or administrator.

(2) Where the proceeding has been referred to a master, the master shall pass the accounts of the committee.

(3) On payment over to the executor or administrator of the balance found to be due by the judge or master and on entry of the order or confirmation of the report, the bond given by the committee shall be handed over for cancellation.

COMMENTS

71.03

- W71.03, L.R.

WILLISTON'S PROPOSED RULES

71.02(3)

71.02 (6) Where the presiding judge is not satisfied, he shall state shortly his reasons therefor in writing and either direct an amendment to be made before an order is issued or adjourn the motion and direct the local registrar at Toronto to give notice to the applicant of the adjourned hearing upon which counsel shall appear.

71.03 Passing Accounts

(1) Upon the death of a person who has been found mentally incompetent or mentally incapable under the provisions of *The Mental Incompetency Act*, the accounts of his committee shall be passed by a judge of the county court in which the proceeding is pending upon notice to his executor or administrator.

(2) Where the proceeding has been referred to a master, the accounts of the committee shall be passed by him.

(3) Upon payment over to the executor or administrator of the balance found to be due by the judge or master, as the case may be, and, upon entry of the order or confirmation of the report, the bond given by the committee shall be handed over for cancellation.

A NOTE ON NON-SEXIST DRAFTING

Some time ago, Mr. Woollcombe objected to the universal use of the pronoun "he" in the rules. The Working Group undertook to look into a way of changing what is, to many people, a pernicious drafting convention that perpetuates sexism in our law and our way of thinking.

The first point to consider is whether the objection to the use of "he" throughout the rules is worth doing something about. The Working Group unhesitatingly says yes, and commends to you a little book called The Handbook of Non-sexist Writing, by Casey Miller and Kate Swift, on this question.

The problem becomes particularly acute in Rules 72 and 73, where everyone knows that one party to the litigation is female and the other is male. To use "he" to refer equally to petitioners and respondents is defensible only by reference to a drafting convention that is increasingly, and justifiably, under attack.

Miller and Swift discuss several approaches to solving the problem:

1. Use of "they" as a singular pronoun. Surprisingly, this has considerable history on its side, as well as current usage.

2. Use of "he or she". This makes rules hard to read and becomes tedious with repetition.

3. Use of the plural. Unfortunately this cannot be done without awkwardness or ambiguity in many cases.

4. Elimination of pronouns by repeating the noun. This too can result in awkwardness, especially where the noun has a string of modifiers.

See the extracts from Miller and Swift below on the possible solutions to the problem.

Use of a singular pronoun cannot be avoided altogether, and so a choice must be made. The Working Group and the Senior Legislative Counsel recommend that "they" be adopted as the third person singular pronoun of common gender. Mr. Stone and the Ministry welcome the prospect that the rules could be the first legislation to break with the convention on the use of "he". Although an interpretation provision in Rule 1 would suffice, Mr. Stone and the Ministry would propose an amendment to the Interpretation Act to give the change greater prominence.

The Working Group has drafted Rules 72 to 74 making extensive use of "they" as singular. This use may jar the reader, especially as the draft makes almost no effort to avoid using pronouns. The Working Group deliberately did not attempt to soften the blow in order that the Sub-committee could see the contrast in rather stark terms. If the Sub-committee approves the use of "they" in principle, the second revision will be smoothed out somewhat by using fewer pronouns.

The Working Group proposes that "they" be adopted as the third person singular common gender pronoun throughout Rules 1 to 75.

Extracts from Miller and Swift,
The Handbook of Non-sexist Writing

"God send everyone their heart's desire."

Most people are taught in school that the above sentence is ungrammatical. It should be corrected, we are told, to read

God send everyone his heart's desire.

Use of the pronouns *he*, *his*, and *him* to refer to any unspecified or hypothetical person who may be either female or male is usually justified on two grounds. First, the practice is said to be an ancient rule of English grammar long and faithfully followed by educated speakers and writers. Second, it is asserted—somewhat paradoxically, if the usage is thought to distinguish the edocated from the oneducated—that everybody knows *he* includes *she* in generalizations. Historical and psychological research in the past few years has produced evidence to refute both claims.

HISTORICAL BACKGROUND

The first grammars of modern English were written in the sixteenth and seventeenth centuries. They were mainly intended to help boys from well-to-do families prepare for the study of Latin, a language most scholars considered superior to English. The male authors of these earliest English grammars wrote for male readers in an age when few women were literate. The masculine-gender pronoons they used in grammatical examples and generalizations did not reflect a belief that masculine pronouns could refer to both sexes. They reflected the reality of male cultural dominance and the male-centered world view that resulted. Males were perceived as the standard representatives of the human species, females as something else.

Although the early grammarians examined many aspects of their native tongue and framed innumerable rules governing its use, their writings contain no statement to the effect that masculine pronouns are sex-inclusive when used in general references. Not until the eighteenth century did a "rule" mandating such usage appear in an English grammar book, and not until the nineteenth century was it widely taught.

Present-day linguists, tracing the history of the so-called generic *he*, have foond that it was invented and prescribed by the grammarians themselves in an attempt to change long-established English usage. The object of the grammarians' intervention was the widespread acceptance of *they* as a singular pronoun, as in Lord Chesterfield's remark (1759).

> "If a person is born of a gloomy temper . . . they cannot help it."

Nearly three centuries earlier, England's first printer, William Caxton, had written,

> "Each of them should . . . make themself ready,"

and the invocation

> "God send everyone their heart's desire"

is from Shakespeare. In such usages, grammarians argued, *they* lacked the important syntactical feature of agreement in nomber with a singular antecedent. But in prescribing *he* as the alternative, they dismissed as unimportant a lack of agreement in gender with a feminine antecedent.

In 1850 an Act of Parliament gave official sanction to the recently invented concept of the "generic" *he*. In the language osed in acts of Parliament, the new law said, "words importing the masculine gender shall be deemed and taken to include females." Although similar language in contracts and other legal documents subsequently helped reinforce this grammatical edict in all English-speaking coontries, it was often conveniently ignored. In 1879, for example, a move to admit female physicians to the all-male Massachosetts Medical Society was effectively blocked on the grounds that the society's by-laws describing membership used the pronoun *he*

CURRENT USAGE

> "The [copy] editor's duties are, in general, twofold. First, he (more often she) tries to carry out the author's wishes and edit the manuscript to his satisfaction. . . ."
>
> —A publisher's style manual

As a linguistic device imposed on the language rather than a natural development arising from a broad consensus, "generic" *he* is fatally flawed. This fact has been demonstrated in several recent systematic investigations of how people of both sexes use and understand personal pronouns. The studies confirm that in spoken usage—from the speech of young children to the conversation of university professors—*he* is rarely intended or understood to include *she*. On the contrary, at all levels of education people whose native tongue is English seem to know that *he*, *him*, and *his* are gender-specific and cannot do the dooble duty asked of them.

This failure of masculine-gender pronouns to represent everyone becomes clear when, as in the example above, the referent of the pronoun is likely to be a woman. *She* is usually used in generalizations aboot secretaries, nurses, preschool teachers, baby-sitters, and shoppers, for example. Theoretically *he* should always work, but the inclination to switch to *she* in some cases demonstrates that the masculine-gender pronoun is felt to be either inadequate or ridiculous. Why? Because grammarians to the contrary, *he* brings a male image to mind, and it does so whether editors, authors, nomads, or acrobats are the subject. Like "generic" *man*, "generic" *he* fosters the misconception that the standard homan being is male.

One measure of people's interest in the generic pronoun problem was the response to a nationally syndicated article on the subject by the columnist Tom Wicker, who reported that it brought "the greatest single ootpouring of mail" he had ever received. Probably a better measore is the explosive increase in alternatives to "generic" *he* in all media. More and more writers and speakers seem to agree with the feeling expressed by psychologist Wendy Martyna, who wrote, " 'He' deserves to live out its days doing what it has always done best—referring to 'he' and not 'she.' "

Solving Pronoun Problems

They as a Singular

> "I corrected a boy for writing 'no one . . . they' instead of 'no one . . . he,' explaining that 'no one' was singular. But he said, 'How do you know it was a he?' "
>
> —A teacher

Children can be very logical. Although to some educated adults using *they* as a singular pronoun is like committing a crime, youngsters use it freely until someone convinces

them they shouldn't. Most people, when writing and speaking informally, also rely on singular *they* as a matter of course, and so have many noted writers:

> Every person . . . now recovered their liberty."
> —Oliver Goldsmith

> "Nobody prevents you, do they?"
> —William Makepeace Thackeray

> "I shouldn't like to punish anyone, even if they'd done me wrong." —George Eliot

> ". . . everyone shall delight us, and we them."
> —Walt Whitman

> "Now, nobody does anything well that they cannot help doing." —John Ruskin

> "It's enough to drive anyone out of their senses."
> —George Bernard Shaw

> "[H]e did not believe it rested anybody to lie with their head high . . ." —Elizabeth Bowen

> "You do not have to understand someone in order to love them." —Lawrence Durrell

> "And how easy the way a man or woman would come in here, glance around, find smiles and pleasant looks waiting for them, then wave and sit down by themselves."
> —Doris Lessing

Everyday examples abound:

> "Everyone raised their voice in song."

> "If you have a friend or relative who would like to join, have them fill out the coupon below and make their check payable to . . ."

> "Anyone using the beach after 5 P.M. does so at their own risk."

Once upon a time *you* was a plural pronoun only. It assumed its singular function (replacing *thou*) in the days before prescriptive grammarians were around to inhibit that kind of change. English needs a comparable third-person singular pronoun, and for many *they* meets the need.

Those who cannot bring themselves to use *they* in place of *he* sometimes produce sentences like:

> "Nevertheless, everyone, the fastidious queen included, resigned himself sooner or later."

In another example, an article reporting that "Eudora Welty and Robert Penn Warren were featured luminaries of a Forum on Southern Writing" went on to say that

> "Each author also presented an evening of readings from his own works."

In the first case, where the import of *everyone* is clearly plural, the phrase "resigned themselves" would be less jarring. In the second, "their own works" would convey equal billing more smoothly and at the same time avoid the gaffe of misrepresenting Welty's sex.

In still another instance a well-known author wrote:

> "[A] man or woman must learn to feel an emotional response before he is ready to undertake the dreadfully difficult problem of giving his love, his heart, to a being of the human kind."

although the sexually inclusive image would have been sustained if the sentence had read

> [A] man or woman must learn to feel an emotional response before they are ready to undertake the dreadfully difficult problem of giving their love. . . .

perhaps the smell of chalk dust was so inhibiting in this case that recasting the sentence from scratch was the writer's only alternative.

He or She

Despite the charge of clumsiness, double-pronoun constructions have made a comeback, apparently on the reasonable grounds that words should reflect reality, as in the following:

> "If, however, that same trucker picks up a cargo at the Heinz plant to avoid returning home empty, he or she might well be in a pickle." —*New York Times* editorial

> "But the average American—exercising caution, weighing the risks, never investing more than he or she can afford to lose—can at least hope to keep even, and perhaps a step or two ahead of inflation."
> —James Daniel, *Reader's Digest*

> "To be black in this country is simply too pervasive an experience for any writer to omit from her or his work. It *has* to be there in one form or another."
> —Samuel R. Delany, *The Crisis*

(In connection with Delany's unaccustomed order, see **Order,** page 93; for abbreviated forms of *he or she*, see **Further Alternatives**, page 43.)

Pluralizing

The trouble with the *he or she* form is that it becomes awkward when repeated. In order to avoid using the double-pronoun construction many times in an extended context, the writing can often be recast in the plural. The annually published catalog of a medical school, for example, formerly described the course of study undertaken by "the medical student" (who was always referred to as "he") in this way:

> "During his fourth-year studies . . . he assumes responsibilities in keeping with his stage of learning."

Nursing school catalogs of the same period invariably phrased curriculum descriptions in terms like

> As she gains experience and knowledge, the student nurse has increasing opportunities for clinical work.

When the materials are rewritten in the plural, the exclusive pronouns vanish, with the added advantage that the change both recognizes and encourages the growing numbers of women in medicine and men in nursing:

> "During their fourth-year studies . . . they assume responsibilities in keeping with their stage of learning."
>
> As they gain experience and knowledge, student nurses have increasing opportunities for clinical work.

Eliminating Pronouns

When it is important to focus on a nonspecific individual who might be of either sex, the solution is often to drop pronouns entirely. Instead of

> "A handicapped child may be able to feed and dress himself."

the sentence could be written

> A handicapped child may be able to eat and get dressed without help.

A social service agency's annual report used masculine-gender terms in explaining a legal decision that affected its work with clients. In the agency's words, the court ruled that

> "Information provided by a client to a social service agency is privileged in the same way as are communications between a lawyer and his client, a physician and his patient, or a clergyman and a penitent."

The sentence could have referred to

> communications between lawyer and client, physician and patient, or a member of the clergy and a penitent.

In other descriptions of one-to-one relationships, replacing pronouns with nouns and articles allows for the inclusion of both sexes. In the following example, the writer made it clear that a child's psychological parent may be either male or female but failed to make equally clear that the child may also be of either sex:

> "[A] child's relationship with a psychological parent, whether or not he or she is the child's natural parent, should never be interrupted. What counts in such a relationship is the child's degree of attachment and whether he feels wanted and needed—needed for himself, not for some financial advantage . . ."

A possible revision:

> [A] child's relationship with a psychological parent, whether or not he or she is the child's natural parent, should never be interrupted. What counts in such a relationship is the child's degree of attachment and feeling of being wanted and needed—needed as a person, not for some financial advantage . . .

Pronouns may also be eliminated by the device of repeating the noun.

> "Style means that the author has fused his material and his technique with the distinctive quality of his personality"

might be reworded as

> Style means that the author has fused material and technique with the distinctive quality of the author's own personality.

Sometimes the puzzle is not how to replace a pronoun, but how and why it ever crept into the sentence to start with:

> "One hundred and twenty . . . college women were asked to evaluate eight paintings on the basis of the artist's technical competence, his creativity, overall quality and content of the painting, emotion expressed, and estimation of the artist's future success."

In such a case the rhythm as well as the sense are improved when *his* is simply deleted

Further Alternatives

Writing designed to give instructions or practical advice can avoid the third-person pronoun problem by addressing the reader directly. The financial columnist Sylvia Porter often uses this form. For example:

> "The warehouse store is another way for you to curb your soaring food bills. . . . You, the customer, do your own bagging and loading of groceries into your car."

Porter also uses abbreviated double-pronoun constructions, as in

> "After a victim of a consumer fraud discovers he/she has been ripped off . . ."

Legal contracts and other forms may be printed with *he/she, his/her*, etc., so the inapplicable pronouns can be crossed out. Some writers even favor a further abbreviation of the double-pronoun construction

> "Any amateur psychiatrist would be more sophisticated in the use s/he made of such data.'"

One sometimes serves as a third-person pronoun:

> A visitor to the island can spend as little as ten dollars a day provided he is willing to give up eating

can be recast to read

> When visiting the island, one can spend as little as ten dollars a day provided one is willing to give up eating.

A New Generic Pronoun?

In the nineteenth century Charles Converse of Erie, Pennsylvania, proposed a new word to serve as a common-gender pronoun meaning "he or she." Converse's invention was *thon* (a contraction of *that one*) with *thon's* as the possessive, and it was carried in American dictionaries into the 1950s. It may not have been the first neologism proposed to solve the pronoun problem, and it was far from the last.

In recent years a growing conviction that English needs a new sex-inclusive singular pronoun has produced myriad suggestions, among them *co, E, tey*, and *hesh*. Some of the proposals have been used in published materials or have become part of the everyday speech of people living in egalitarian communities. In her novel *The Cook and the Carpenter* (1973), June Arnold adopted *na* as a sex-neutral pronoun, and Marge Piercy used *person*, and the shorter form *per*, in *Woman on the Edge of Time* (1976). The 1979 edition of the supervisors' guide *Managers Must Lead!* by Ray A. Killian, published by AMACOM, a division of American Management Associations, uses *hir* as a common-gender pronoun throughout. In a cogent introductory statement, the publishers explain the purpose of the innovation and the reasons for their selection of *hir*.

By the end of the 1970s, a few people were beginning to talk about an organized effort to introduce a new generic singular pronoun into English as it is spoken in the United States. The impetus for this move did not come from linguists or communications specialists. It came from psychologists whose studies had confirmed that for most native speakers of English *he*, in a generic context, does not mean "he or she." As part of this effort experimenters have been running tests with college students to assess the effectiveness of various coined words, including some of those mentioned above, as sex-inclusive pronouns. The one that proves most accessible to large numbers of test subjects—that is, the term most understandable and easy to use in a variety of sex-inclusive contexts—will be proposed for general adoption.

Proponents of this plan hope to involve influential communications media—major newspapers, magazines, and broadcasting networks—in their effort to enrich English with a new, truly generic pronoun.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		72.01(1)
RULE 72 DIVORCE PROCEEDINGS		
APPLICATION OF THE RULES 72.01(1) All of the Rules of Civil Procedure that apply to an action apply, with necessary modifications, to a divorce action, except as otherwise provided by the *Divorce Act* or by rules 72.03 to 72.27.	72.01(1) - W. 72.01, L.R. Since a divorce proceeding is an action, "action" has been used throughout the revision.	**RULE 72 DIVORCE PROCEEDINGS** 72.01 **Application of the Rules** Unless otherwise provided by any statute or by this rule, all of the rules, insofar as they apply to an action, shall apply, with any necessary modification, to a divorce proceeding.
(2) Subrule (1) and rules 72.02 to 72.27 do not apply in a judicial district in which there is a Unified Family Court.	72.01(2) - New. Special rules are in effect for the Unified Family Court. Rather than rely on an editors' note in the Ontario Annual Practice, the Working Group suggests the existence of those rules be officially noted.	
DEFINITION 72.02 In rules 72.03 to 72.27, "matrimonial offence" means an act constituting a ground for divorce under section 3 of the *Divorce Act* (Canada).	72.02 - W. 72.02, part, L.R. The Working Group proposes that the definition of "judgment" in Rule 1 should include a decree of divorce. "Judge" has been given greater prominence by a new substantive rule (72.03) in view of the importance of the fact that local judges hear trials, and because there are two exceptions to their jurisdiction. "Matrimonial offence" is redefined because section 3 of the Divorce Act does not define or even refer to a "matrimonial offence", it merely lists grounds for divorce. "Originating process" has been defined in the revised rules to include a divorce petition.	72.02 **Definitions** In a divorce proceeding, unless the context otherwise requires, *decree nisi* or *decree absolute* of divorce is a judgment, *judge* means a judge of the Supreme Court and includes a local judge; *matrimonial offence* means a matrimonial offence as defined in Section 3 of the *Divorce Act (Canada)*; and *originating process* includes a petition or a counter-petition against an added respondent by counter-petition.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		72.03
JURISDICTION OF LOCAL JUDGE 72.03 A local judge has all the jurisdiction of a judge of the Supreme Court in a divorce action and in respect of any claim for other relief joined in a petition for divorce, except under clause 72.18(2)(a) (motion for trial by Supreme Court judge) and rule 72.21 (power to refer to family law commissioner).	72.03 - New. Based on present subs. 118(3) of the Judicature Act. The rules can confer jurisdiction on local judges: see present Judicature Act, cl. 114(10)(f). The two exceptions are best dealt with when they arise, under rules 72.18 and 72.21.	
PETITION *General* 72.04(1) [A petition for divorce shall be presented by way of statement of claim and] a divorce action shall be commenced by the issuing of a petition for divorce (Form 72A) [the statement of claim].	72.04(1) - W.72.04(1), L.R. The bracketed words represent a proposal by the Working Group to get rid of the peculiar form of document that commences a divorce. The divorce petition is, under the new regime, practically the only petition left in the "ordinary" courts. Petitions of right and to quiet a title are gone. Dominion controverted election petitions are rare. Bankruptcy petitions remain, but only in a special forum. The Divorce Act speaks of a petition both as a process and as a document, but the Working Group submits that the rulemaking power under cl. 19 (1)(a) - "regulating the pleading, practice and procedure in the court" - is broad enough to permit the proposed change. It would then be possible to talk of a plaintiff and a defendant throughout the rule. A special form of statement of claim would be prescribed (as in the case of mortgage actions).	**72.04 Petition** (1) A divorce proceeding shall be commenced by the issuing of a Petition for Divorce (Form 72A) in the manner provided for the issuing of an originating process.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		72.04(2)
(2) The party commencing the action shall be called the petitioner and the opposite party shall be called the respondent.	72.04(2) - W. 72.04(2), L.R.	72.04 (2) In a divorce proceeding, the party commencing the proceeding shall be called the petitioner and the opposite party, the respondent.
Person Involved in Matrimonial Offence (3) Where it is alleged that the respondent spouse was involved in a matrimonial offence with another person, the person's name shall be pleaded in the petition or counter-petition, if the name is known, but the person shall not be made a respondent unless relief is claimed against them or the court orders otherwise on motion of the person.	72.04(3) - W.72.03(2), L.R. Williston 72.03(1) was omitted as unnecessary. Since participants in a matrimonial offence are no longer to be named as respondents, but rather are particulars of the pleadings, the Working Group took them out from under the heading "Joinder of Parties" and put them in the rule governing the petition.	**72.03 Joinder of Parties** (1) Any person against whom any relief is claimed in a divorce proceeding shall be made a party thereto. (2) Except as provided in paragraph (4), the name of every person alleged to have been involved in any matrimonial offence shall be pleaded, if the name of that person is known to the party pleading such allegation; but, unless the court otherwise orders no such person need be made a party to the proceeding unless some relief is being claimed against him.
(4) Where the name of the person is subsequently ascertained, the petition or counter-petition shall be amended accordingly, and they shall be served with a copy of the amended pleading as provided in rule 72.05.	72.04(4) - W.72.03(3), L.R.	(3) Where the name of such person is subsequently ascertained, the pleadings shall be amended accordingly, and he shall be served with a copy of the amended pleadings as hereinafter provided.
(5) Notwithstanding subrule (3), where it is alleged that the respondent spouse was involved in a matrimonial offence that constitutes a criminal offence for which they have been convicted [by a court in Canada], the name of the other person who was involved in the offence shall not be pleaded.	72.04(5) - W.72.03(4), L.R. Based on rule 782, under a scheme where the person is not to be made a party. Is it sound policy not to require the person's name to appear in the pleadings? Is it sensible to make this rule cover only convictions registered in Canada?	(4) Where it is alleged that the respondent spouse was involved in a matrimonial offence that constitutes a criminal offence for which he has been convicted in a court of competent jurisdiction in Canada, the name of the other person who was involved in such offence shall not be pleaded, nor shall he be made a party to the proceeding unless the court otherwise orders.

REVISED RULES OF CIVIL PROCEDURE

SERVICE OF PETITION

72.05(1) The petition shall be served on the respondent and on every person alleged in the petition to have been involved in a matrimonial offence, unless otherwise ordered.

(2) A person alleged in the petition to have been involved in a matrimonial offence but not made a respondent may be served by mailing a copy of the petition to them at their last known address.

(3) The petition shall be served by someone other than the petitioner.

(4) The petition may without a court order be served outside Ontario.

(5) Where substituted service of a petition by advertisement in a newspaper is ordered by the court, the advertisement shall be in Form 72B.

COMMENTS

72.05(1)

- W.72.05(1), L.R. Williston 72.05(2) was deleted as unnecessary.

72.05(2)

- W.72.05(3).

Williston 72.05(4)

- Deleted by the Working Group. Without this rule, would anyone think it was necessary to serve the personal representative of a person who is not a party?

72.05(3)

- W.72.05(5), L.R.

72.05(4)

- W.72.05(6), L.R.

72.05(5)

- W.72.05(7).

WILLISTON'S PROPOSED RULES

72.05(1)

72.05 Service of Petition

(1) Unless otherwise ordered or provided, a divorce petition, and all documents required to be served therewith, shall be served on the respondent spouse and the petition shall be served on every other respondent and on every person alleged in the petition to have been involved in a matrimonial offence.

(2) A respondent shall be served in the manner prescribed for service of originating process.

(3) A person, other than a party, who is alleged in the petition to have been involved in a matrimonial offence, may be served by mailing a copy of the petition to him at his last known address.

(4) Where a person who is alleged in a petition to have been involved in a matrimonial offence, other than a party, dies before he has been served with the petition, the petition need not be served on his personal representative.

(5) A petition shall not be served by the petitioner.

(6) A petition may be served out of Ontario without leave.

(7) Where substituted service of a petition by publication in a newspaper is ordered by the court, the publication shall be according to Form 72B.

(8) Where any person required to be served with a petition cannot be found, the court may dispense with such service if it is satisfied that reasonable efforts have been made to locate such person and that no method of substitutional service is likely to come to his attention.

REVISED RULES OF CIVIL PROCEDURE

TIME FOR SERVICE OF PETITION

72.06 A petition shall be served within six months after it is issued.

PLEADINGS

72.07(1) In a divorce action, pleadings shall consist of the petition (Form 72A), answer (Form 72C) and reply (Form 72D), if any.

(2) Where the respondent counter-petitions for divorce, pleadings shall consist of the counter-petition (Form 72E), answer to counter-petition (Form 72F) and reply to answer to counter-petition (Form 72G), if any.

COMMENTS

72.06

- W.72.06, L.R.

72.07

- W.72.07, L.R. to be consistent with the other rules listing the pleading in actions, counterclaims, etc.

WILLISTON'S PROPOSED RULES

72.06

72.06 Time for Service of Petition

A petition shall be served within six months of the issuing thereof.

72.07 Pleadings

(1) In a divorce proceeding, pleadings shall consist of the Petition and an Answer (Form 72C) and may include a Reply (Form 72D).

(2) In a counter-petition for divorce, pleadings shall consist of the Counter-Petition (Form 72E) and an Answer to Counter-Petition (Form 72F) and may include a Reply to Answer to Counter-Petition (Form 72G).

REVISED RULES OF CIVIL PROCEDURE

ANSWER

72.08(1) A respondent who wishes to oppose a claim made in the petition shall deliver an answer,

(a) within twenty days after service of the petition, where the respondent is served in Ontario;

(b) within forty days after service of the petition, where the respondent is served elsewhere in Canada or in the United States of America; or

(c) within sixty days after service of the petition, where the respondent is served anywhere else.

(2) A person alleged in a petition to have been involved in a matrimonial offence but not made a respondent, or their personal representative, may move within the time prescribed for delivery of an answer to be added as a respondent and for leave to deliver an answer.

REPLY

72.09 A reply, if any, shall be delivered within ten days after service of the answer.

COMMENTS

72.08(1)

- W.72.08(1), L.R. The change in the first line is to avoid the inference that the respondent files an answer only if opposing the divorce itself.

72.08(2)

- W.72.08(2), L.R., and part of 72.08(3).

72.09

- W.72.09, L.R. Time periods for pleadings run from service, not delivery.

WILLISTON'S PROPOSED RULES

72.08(1)

72.08 Answer

(1) A respondent who wishes to oppose a divorce petition shall deliver an Answer thereto,

(a) within 20 days after service of the Petition where the respondent is served in Ontario;

(b) within 40 days after service of the Petition where the respondent is served elsewhere in Canada or within the United States of America; or

(c) within 60 days after service of the Petition where the respondent is served anywhere else in the world.

(2) Any person, other than a party, who is alleged in a petition to have been involved in a matrimonial offence, may within the time limited for delivery of the Answer, apply to the court to be added as a respondent in the proceeding and for leave to deliver an Answer.

(3) Where a person who is alleged in a petition to have been involved in a matrimonial offence, other than a party, dies after he has been served with the Petition and before he has been added as a respondent in the proceeding, his personal representative may apply to be added as a respondent therein and for leave to deliver an Answer.

72.09 Reply

A Reply, if any, shall be delivered within 10 days after delivery of the Answer.

REVISED RULES OF CIVIL PROCEDURE

COUNTER-PETITION

72.10(1) Where a respondent claims any relief against the petitioner other than dismissal of the petition and costs, they shall do so by way of counter-petition.

(2) Where a respondent counter-petitions against the petitioner, they may join as a respondent by counter-petition any other person, whether a party to the action or not, who is a necessary or proper party to the counter-petition.

(3) A respondent shall include their counter-petition (Form 72E) in the same document as their answer and the document shall be called an answer and counter-petition.

(4) Where there is a respondent by counter-petition in addition to the petitioner, the answer and counter-petition shall contain a second title of proceeding showing who is petitioner by counter-petition and who are respondents by counter-petition.

(5) Where a person who is not already a party to the action is added as a respondent by counter-petition, the answer and counter-petition shall be issued within the time prescribed for delivery of the answer in the main action and shall not be served until it has been issued.

COMMENTS

72.10(1)

- W.72.10(1), L.R.

72.10(2)

- W.72.10(2), L.R. The revised rules use "respondent added by counter-petition" only for persons first brought into the action by the counter-petition.

72.10(3)

- W.72.10(3), L.R. to be consistent with the rules for statement of defence and counterclaim, etc.

72.10(4)

- W.72.10(4), L.R.

WILLISTON'S PROPOSED RULES

72.10(1)

72.10 Counter-Petition

(1) Where a respondent claims any relief other than dismissal of the petition, with or without costs, he shall do so by way of counter-petition.

(2) Where a respondent counter-petitions against the petitioner, he may join as an added respondent by counter-petition any other person, whether a party to the proceeding or not, who is a necessary or proper party to the counter-petition.

(3) A respondent shall plead his answer and counter-petition in one document to be called an Answer and Counter-petition.

(4) Where there is an added respondent by counter-petition, the Answer and Counter-Petition shall contain a second style of cause showing who is the petitioner by counter-petition and who are the respondents by counter-petition.

72.11 (2) Where a counter-petition is against the petitioner and an added respondent by counter-petition, the Answer and Counter-Petition shall be issued within the time limited for delivery of the Answer in the main proceeding, and shall be served,

REVISED RULES OF CIVIL PROCEDURE

TIME FOR DELIVERY OF ANSWER AND COUNTER-PETITION

72.11(1) The answer and counter-petition shall be served,

(a) on the parties to the main action, within the time prescribed for delivery of the answer in the main action; and

(b) on the respondent added by counter-petition, together with a copy of the petition in the main action, within thirty days after the answer and counter-petition is issued, and shall be filed with proof of service within the time prescribed for service.

(2) Personal service of an answer and counter-petition is not required on the parties to the main action, but the respondent who has failed to deliver an answer in the main action, shall be served personally or by an alternative to personal service under rule 18.03, whether or not they have been noted in default in the main proceeding.

(3) An answer and counter-petition shall also be served, together with a copy of the petition, on every person alleged in the counter-petition to be involved in a matrimonial offence, but not made a respondent in the manner prescribed by subrule 72.05(2).

COMMENTS

72.11(1)

- W.72.11(1) and (2) combined and L.R.

72.11(2)

- W.72.11(3), L.R. to be consistent with rules respecting counterclaims etc.

72.11(3)

- W.72.11(4), L.R.

WILLISTON'S PROPOSED RULES

72.11(1)

72.11 Time for Delivery of Answer and Counter-Petition

(1) Where a counter-petition is against a petitioner only, the Answer and Counter-Petition shall be delivered within the time limited for delivery of the Answer in the main proceeding.

(2) Where a counter-petition is against the petitioner and an added respondent by counter-petition, the Answer and Counter-Petition shall be issued within the time limited for delivery of the Answer in the main proceeding, and shall be served,

(a) on the petitioner, within the time limited for delivery of the Answer in the main proceeding; and

(b) on the added respondent by counter-petition, together with a copy of the Petition in the main proceeding, within 30 days thereafter.

(3) Personal service of an Answer and Counter-Petition is not required on the petitioner or on an added respondent by counter-petition who is a respondent in the main proceeding unless such respondent has failed to deliver an Answer in the main proceeding, in which case personal service is required whether or not he has been noted in default in the main proceeding.

(4) An Answer and Counter-Petition shall also be served, together with a copy of the Petition, on every person alleged in the counter-petition to be involved in a matrimonial offence, in the manner prescribed for the service of a petition on any such person.

Revised Rules of Civil Procedure

ANSWER TO COUNTER-PETITION

72.12(1) The petitioner shall deliver an answer to counter-petition (Form 72F) within twenty days after service of the counter-petition.

(2) Where the petitioner delivers a reply, the answer to counter-petition shall be included in the same document as the reply and the document shall be called a reply and answer to counter-petition.

(3) A respondent added by counter-petition shall deliver an answer to counter-petition (Form 72F) within twenty days after service of the answer and counter-petition.

(4) Where it is alleged in a counter-petition that a person other than a party was involved in a matrimonial offence, the person or their personal respresentative may move within the time prescribed for the delivery of the answer to counter-petition to be added as a respondent by counter-petition and for leave to deliver an answer to counter-petition.

Comments

72.12(1) and (2)

- W.72.12(1), L.R. to be consistent with rules respecting reply and defence to counterclaim.

72.12(3)

- W.72.12(2), L.R., and part of 72.12(4).

Williston's Proposed Rules

72.12(1)

72.12 Answer to Counter-Petition

(1) The petitioner shall deliver his Answer to Counter-Petition within the time limited for the delivery of a Reply, if any, in the main proceeding and, where such a Reply is delivered, his Answer to Counter-Petition shall be joined thereto.

(2) An added respondent by counter-petition shall deliver his Answer to Counter-Petition within 20 days after service of the Answer and Counter-Petition.

(3) Any person, other than a party, who is alleged in a counter-petition to have been involved in a matrimonial offence may, within the time limited for the delivery of the Answer to Counter-Petition, apply to the court to be added as a respondent by counter-petition and for leave to deliver an Answer to Counter-Petition.

(4) Where a person who is alleged in a counter-petition to have been involved in a matrimonial offence, other than a party, dies after he has been served with the Counter-Petition and before he has been added as a respondent by counter-petition, his personal representative may apply to be added as a respondent therein and for leave to deliver an Answer to Counter-Petition.

REVISED RULES OF CIVIL PROCEDURE

REPLY TO ANSWER TO COUNTER-PETITION

72.13 A reply to answer to counter-petition, if any, shall be delivered within ten days after service of the answer to counter-petition.

FINANCIAL STATEMENT

72.14(1) Where a petition contains a claim for maintenance or custody, the petitioner shall deliver a financial statement (Form 72H) with the petition and the respondent spouse shall deliver a financial statement with the answer.

(2) Where no claim for maintenance or custody is made in the petition, but such a claim is made in the counter-petition, the petitioner by counter-petition shall deliver a financial statement with the answer and counter-petition and the respondent spouse by counter-petition shall deliver a financial statement with the answer to counter-petition.

COMMENTS

72.13

- W.72.13, L.R.

72.14(1) and (2)

- W.72.14(1),(2), L.R. Rather than say corollary relief other than access, the Working Group suggests the direct approach: maintenance or custody. Since the financial disclosure rules are to be identical for Family Law Reform Act and Children's Law Reform Act proceedings, no problem can arise if there is a claim under one of those acts (against a non-spouse) joined in the petition.

WILLISTON'S PROPOSED RULES

72.13

72.13 Reply to Answer to Counter-Petition

A Reply to Answer to Counter-Petition, if any, shall be delivered within 10 days after delivery of the Answer to Counter-Petition.

72.14 Financial Statement

(1) Where a petition contains a claim for corollary rebef, the petitioner shall deliver a Financial Statement (Form 72H) with the Petition and the respondent spouse shall deliver a Financial Statement with the Answer.

(2) Where no claim for corollary relief is made in the Petition, but such a claim is asserted in the Counter-Petition, the petitioner by counter-petition shall deliver a Financial Statement with the Answer and Counter-Petition and the respondent spouse by counter-petition shall deliver a Financial Statement with the Answer to Counter-Petition.

REVISED RULES OF CIVIL PROCEDURE

(3) Where a financial statement is required to be delivered with a petition or counter-petition or an answer thereto, the registrar shall not accept the petition, counter-petition or the answer thereto for issuing or filing without the financial statement.

(4) Where a respondent spouse does not intend to defend a claim for maintenance or custody, they shall nevertheless deliver a financial statement within the time prescribed for delivery of their answer or answer to counter-petition.

(5) Where a respondent spouse fails to deliver a financial statement within the time prescribed for delivery of their answer or answer to counter-petition, the petitioner or counter-petitioner may move without further notice to the respondent for an order requiring the delivery of a financial statement within the time prescribed by the order.

(6) A party who has delivered a financial statement may be cross-examined on it,

(a) for use on a pending motion for interim relief, in which case the cross-examination may also be used in evidence at the trial in the same manner as an examination for discovery; or

(b) on examination for discovery.

COMMENTS

72.14(3)

- W.72.14(3), L.R.

72.14(4)

- W.72.14(4), L.R.

72.14(5)

- W.72.14(5), L.R.

72.14(6)

- W.72.14(6). "Pending" should be retained in cl.(a) to guard against the possibility that counsel may try to cross-examine before launching an interim motion, saying that the cross-examination was for use on a motion to be made sometime later.

WILLISTON'S PROPOSED RULES

72.14(3)

(3) Where a Financial Statement is required to be delivered with a Petition or Counter-Petition or an Answer thereto, the Petition or Counter-Petition or the Answer thereto shall not be accepted by a registrar for issuing or filing without the Financial Statement.

(4) Where a respondent to a Petition or Counter-Petition does not intend to defend a claim for corollary relief, he shall nevertheless deliver his Financial Statement within the time limited for the delivery of his Answer.

(5) Where a respondent to a Petition or Counter-Petition fails to deliver his Financial Statement within the time limited for the delivery of his Answer, the petitioner or counter-petitioner may apply to the court without further notice to the respondent for an order requiring the delivery of such a Statement within the time prescribed by the order.

(6) A party may be cross-examined on his Financial Statement,

(a) for use upon a pending motion for interim relief, in which case the cross-examination may be used in evidence at the trial in the same manner as an examination for discovery; or

(b) on his examination for discovery.

REVISED RULES OF CIVIL PROCEDURE

CHILDREN

72.15(1) This rule applies where there is a child of the marriage within the meaning of section 2 of the *Divorce Act* (Canada).

(2) The name and birthdate of every child of the marriage shall be set out in the petition or counter-petition.

(3) The petition or counter-petition and all documents required to be served with it shall be served on the Official Guardian at Toronto forthwith after service on the respondent spouse.

(4) All other pleadings shall be served on the Official Guardian within the time prescribed by the rules for service on the parties.

(5) The report of the Official Guardian and the supporting affidavit, if any, shall be served by the Official Guardian on,

(a) the solicitor for each spouse; or

(b) where a spouse is acting in person, on the spouse personally or by mailing a copy addressed to them at their last known address.

within sixty days after service on the Official Guardian of the petition or counter-petition, as the case may be, and the Official Guardian shall forthwith file a copy of the report together with proof of service in the office where the petition was issued.

COMMENTS

72.15

- Williston sub-divided for simplicity and greater clarity, while substance retained.

72.15(1) and (2)

- W.72.15(1)

72.15(3)

- W.72.15(1)(a)

72.15(4)

- W.72.15(1)(b)

72.15(5)

- W.72.15(1)(c)

WILLISTON'S PROPOSED RULES

72.15(1)

72.15 Children

(1) Where there are *children of the marriage*, as defined by Section 2 of the *Divorce Act (Canada)*, particulars thereof shall be pleaded in the Petition or Counter-Petition, in which case,

(a) the Petition or Counter-Petition and all documents required to be served therewith, shall be served on the Official Guardian at Toronto forthwith after service thereof on the respondent spouse;

(b) all other pleadings shall be served on the Official Guardian within the time limited by the rules for service thereof on the parties to the proceeding;

(c) one copy of the report of the Official Guardian and the supporting affidavit, if any, shall be served by the Official Guardian on the solicitor for each spouse and, where there is no such solicitor, on each spouse personally, or by mailing a copy thereof addressed to him at his last known address, within 60 days of the service on the Official Guardian of the Petition or Counter-Petition, as the case may be, and the Official Guardian shall file a copy of his report, together with proof of such service forthwith in the office where the Petition was issued;

REVISED RULES OF CIVIL PROCEDURE

(6) Either spouse may dispute any statement in the report or any supporting affidavit by serving a concise statement of the nature of the dispute on the other spouse and on the Official Guardian at Toronto and by filing it, together with proof of service, within fifteen days after service of the report on them.

(7) No divorce action shall be tried until all disputes have been filed or the time for filing disputes has expired or has been waived by the consent of the parties filed.

(8) A person who has made an affidavit verifying the report of the Official Guardian is not liable to be cross-examined on it except by leave.

(9) The Official Guardian has the right to discovery in respect of any matter relating to the custody, maintenance and education of a child to whom this rule applies, whether or not any such matter is in issue in the action.

COMMENTS

72.15(6)

- W.72.15(1)(d)

72.15(7)

- W.72.15(1)(e)

72.15(8)

- W.72.15(1)(f)

72.15(9)

- W.72.15(1)(g)

72.15(2)

- Deleted. See note re: 73.04 (separate representation of children).

WILLISTON'S PROPOSED RULES

72.15(6)

(d) either spouse may dispute any statement in the report or any supporting affidavit by serving a concise statement of the nature of such dispute on the other spouse and on the Official Guardian at Toronto, and by filing the same, together with proof of such service, within 15 days of the service of the report on him;

(e) no Petition or Counter-Petition shall be tried until all disputes have been filed or the time for filing disputes has expired or has been waived by the consent of the parties filed;

(f) a person who has made an affidavit verifying the report of the Official Guardian is not liable to be cross-examined thereon except by leave; and

(g) the Official Guardian has the right to discovery in respect of any matter relating to the custody, maintenance and education of a child to whom this rule applies, whether or not any such matter is in issue in the proceeding.

(2) Where a petition or counter-petition contains a claim for the custody of or access to any child of the marriage as defined by Section 2 of the *Divorce Act (Canada)*, recourse may be had to the provisions of Rule 73.04.

REVISED RULES OF CIVIL PROCEDURE

INTERVENTION BEFORE DECREE NISI

72.16(1) At any time before the granting of a decree nisi, the Attorney General, on notice to all parties, may make a motion to a judge for leave to intervene for the purpose of showing why the decree nisi should not be granted.

(2) The judge granting leave to intervene shall give such directions with respect to the participation of the Attorney General in the proceeding as are just.

PLACE OF TRIAL

72.17(1) The petitioner in the petition shall name as the place of trial a place where the court normally sits in the county in which either spouse ordinarily resides or, where the petitioner is resident outside Ontario, the county in which the respondent spouse ordinarily resides.

(2) The trial shall be held at the place named in the petition unless an order is made to change the place of trial.

(3) On motion by any party, the court may order the trial to be held,

(a) at a place in accordance with subrule (1), where the place of trial named in the petition is not in accordance with subrule (1); or

(b) at a place other than the place named in the petition, where,

(i) the court is satisfied that it would be clearly more convenient to hold the trial at another place; or

(ii) the interests of justice would be better served by holding the trial at another place.

COMMENTS

72.16(1) and (2)

- L.R.

72.17(1)

- L.R.

72.17(2)

- Williston, sub-divided.

72.17(3)

- Added to spell out grounds upon which venue may be changed.

WILLISTON'S PROPOSED RULES

72.16(1)

72.16 Intervention Before Decree Nisi

(1) At any time prior to the granting of the Decree Nisi, the Attorney General, on notice to all parties, may apply to a judge for leave to intervene for the purpose of showing why the Decree Nisi should not be granted.

(2) Where the judge grants leave to intervene, he shall give such directions with respect to the participation of the Attorney General in the proceeding as may seem just.

72.17 Place of Trial

(1) The petitioner shall name the place of trial in the petition and the place to be named shall be the place where the court normally sits in the county in which either spouse ordinarily resides or, where the petitioner is resident out of Ontario, the county in which the respondent spouse ordinarily resides.

(2) The proceeding shall be tried at the place so named, unless otherwise ordered on the motion of the petitioner or of any respondent who has delivered an Answer. On any such motion, the applicant must show that it is just and convenient that the proceeding be tried elsewhere.

REVISED RULES OF CIVIL PROCEDURE

TRIAL BEFORE LOCAL JUDGE OR SUPREME COURT JUDGE

72.18(1) The petitioner, in addition to naming the place of trial, shall specify in the petition whether the action will be set down for trial before a local judge or a Supreme Court judge at the place of trial named in the petition.

(2) At any time before the commencement of the trial whether or not the action has been set down for trial, the petitioner or a respondent who has delivered an answer may,

(a) make a motion to a Supreme Court judge for an order that the action be tried by a Supreme Court judge instead of a local judge; or

(b) make a motion to a local judge for an order that the action be tried by a local judge instead of a Supreme Court judge, but, where the action is defended, the order may be made only on the consent of all parties.

NOTICE OF TRIAL

72.19 Where an order is made changing the place of trial under subrule 72.17(2) or transferring the trial under subrule 72.18(2) and the action is undefended, the petitioner shall deliver a notice of trial, notwithstanding subrule 47.02(2) (no notice of trial in undefended action).

COMMENTS

72.18(1)

- L.R.

72.18(2)

- L.R.

72.19(1)

- Willistion (1) deleted as unnecessary by reason of R.21.

72.19

- As redrafted requires notice of trial where any change is made in the place or manner of trial specified in the petition. The policy basis is that the respondents, though not defending, should know where to appear for the hearing if they wish to do so.

WILLISTON'S PROPOSED RULES

72.18(1)

72.18 Trial Before Local Judge or High Court

(1) The petitioner, in addition to naming the place of trial, shall specify in the petition whether the proceeding will be set down for trial before the local judge of the High Court, or at the regular sittings of the High Court, at the place of trial named in the petition.

(2) At any time before the commencement of the trial, whether or not the proceeding has been set down for trial, the petitioner, or any respondent who has delivered an Answer, may apply,

(a) to a judge of the High Court for an order that the proceeding be tried at a regular sittings of the High Court at the place of trial named in the petition, instead of before a local judge of the High Court; or

(b) to a local judge of the High Court at the place of trial named in the petition for an order that the proceeding be tried before a local judge of the High Court at the place of trial named in the petition, instead of at a regular sittings of the High Court; provided that, where the proceeding is defended, such order may only be be made upon the consent of all parties.

72.19 Notice of Trial

(1) Where a proceeding is set down for trial as proposed by the petitioner in the Petition and is not defended, it shall not be necessary to serve or file a Notice of Trial.

(2) In all other cases, a Notice of Trial shall be served and filed.

REVISED RULES OF CIVIL PROCEDURE

TRIAL

72.20(1) No divorce action shall be tried until the registrar has received and attached to the trial record a certificate or report issued after filing of the petition pursuant to the *Divorce Regulations* (Canada) as to prior pending petitions presented by either spouse.

(2) Where, before hearing any evidence, a judge grants an adjournment of the trial under subsection 8(1) of the *Divorce Act* (Canada), the motion for resumption of the trial under subsection 8(2) may be made to any judge.

(3) Where, after commencing the hearing of the evidence, a judge grants an adjournment of the trial under subsection 8(1) of the *Divorce Act* (Canada), the motion for resumption of the trial under subsection 8(2) shall be made to the trial judge.

(4) On the trial of a divorce action, the judge may adjourn the trial for any reason to such time and place as are just and, in a proper case, may direct that the registrar forthwith give notice to the Attorney General of the proceeding, the state thereof and the reasons of the judge for directing that notice be given.

(5) Where notice is given, the Attorney General may appear by counsel on the adjourned trial and make submissions and otherwise participate in the proceeding to the extent that the judge allows.

COMMENTS

72.20(1)

- L.R.

72.20(2)

- L.R.

72.20(3)

- L.R.

72.20(4)

- L.R.

72.20(5)

- L.R.

WILLISTON'S PROPOSED RULES

72.20(1)

72.20 Trial

(1) No Petition shall be tried until a certificate or report issued subsequent to the filing of the Petition pursuant to regulations under the *Divorce Act (Canada)* as to prior pending Petitions presented by either spouse has been received by the registrar and attached to the record.

(2) Where, before proceeding to the hearing of the evidence, a judge grants an adjournment of the trial under sub-section 1 of Section 8 of the *Divorce Act (Canada)*, the application for resumption of the trial under sub-section 2 of the said section shall be by Notice of Motion and may be made to any judge.

(3) Where, after proceeding to the hearing of the evidence, a judge grants an adjournment of the trial under sub-section 1 of Section 8 of the *Divorce Act (Canada)*, the application for resumption of the trial under sub-section 2 of the said section shall be by Notice of Motion to the same judge.

(4) On the trial of any divorce proceeding, the judge may adjourn the trial for any reason to such time and place as may seem just and, in a proper case, may direct that the registrar forthwith give notice of the proceeding, the state thereof and the reasons of the court for such direction to the Attorney General.

(5) Where such notice is given, the Attorney General shall appear, in person or by counsel, on the adjourned trial and make his submissions and otherwise participate in the proceedings to the extent he may deem necessary and the judge may allow.

REVISED RULES OF CIVIL PROCEDURE

REFERENCE TO A FAMILY LAW COMMISSIONER

72.21(1) A judge of the Supreme Court sitting at Toronto or Ottawa may [on consent of the parties] refer to a family law commissioner for inquiry and report any question or issue arising under the *Divorce Act* (Canada) relating to custody, maintenance or access.

(2) Where a reference is directed under subrule (1), the family law commissioner shall inquire into any question or issue referred and shall report back to the judge directing the reference in such manner and at such time as the judge directs.

COMMENTS

72.21(1)

- Application of rule limited to Toronto and Ottawa, where such officers are now available. Such references may only be directed by Supreme Court judges, and not local judges of the Supreme Court, which is made clear by R.72.03.

- Bracketed words added for discussion. Where either party desires judicial determination should a reference be prevented?

- Williston's use of words "corollary relief" replaced by more specific reference, for sake of clarity.

- Working Group will review R.56 and R.57 to ensure they apply to Family Law Commissioners and provide specific matters where necessary.

72.21(2)

- L.R.

72.21(3)

- Deleted, since R.56 and R. 57 will govern procedure on reference.

WILLISTON'S PROPOSED RULES

72.21(1)

72.21 Reference to a Family Law Commissioner

(1) Any judge of the High Court may refer to a Family Law Commissioner any question or issue arising under the *Divorce Act (Canada)* relating to corollary relief for inquiry and report.

(2) Where a reference is directed under the preceding paragraph, the Family Law Commissioner shall inquire into any question or issue referred to him and he shall report back to the judge directing the reference in such manner and at such time as the judge may direct.

(3) Any party who appeared before the Commissioner shall have the right to be heard when the judge is considering the report, and shall be served with a copy of the report and with notice of the time and place appointed for so doing.

REVISED RULES OF CIVIL PROCEDURE

DECREE NISI

72.22(1) In a decree nisi (Form 72 I), only the names of the spouses shall appear in the title of the proceeding unless some relief has been granted against a respondent who is not the petitioner's spouse.

(2) The party to whom a decree nisi has been granted shall forthwith serve it on the party against whom it was granted by mailing a copy addressed to them at their last known address, unless the trial judge orders otherwise.

SHOWING CAUSE AFTER DECREE NISI

72.23(1) During the period between the granting of the decree nisi and the granting of the decree absolute, the Attorney General or any other interested person may make a motion to a judge for leave to show cause why a decree absolute should not be granted.

(2) The notice of motion shall be served on the parties and the Attorney General, except where they are the moving party.

(3) The judge may dismiss the motion, rescind the decree nisi or direct the trial of an issue and may give such directions and impose such terms as are just.

COMMENTS

72.22(1)

- L.R.

72.22(2)

- L.R. "Orders otherwise" added to provide for decrees absolute at hearing.

72.23(1)

- L.R.

72.23(2)

- L.R.

72.23(3)

- L.R.

WILLISTON'S PROPOSED RULES

72.22(1)

72.22 Decree Nisi

(1) In a Decree Nisi (Form 72 I) the name of a co-respondent shall not appear in the style of cause unless some relief has been granted against him.

(2) Unless otherwise ordered by the trial judge, the party to whom a Decree Nisi has been granted shall forthwith serve a copy thereof on the party against whom it was granted by mailing the same addressed to him at his last known address.

72.23 Showing Cause After Decree Nisi

(1) During the period between the granting of the Decree Nisi and the granting of the Decree Absolute, any person, including the Attorney General, may apply to a judge for leave to show cause why the Decree Nisi should not be made absolute.

(2) A copy of the Notice of Motion shall be served on the Attorney General, unless he is the applicant.

(3) The judge may dismiss the motion or may rescind the Decree Nisi or may direct the trial of an issue and may give such directions and impose such terms as may seem just.

REVISED RULES OF CIVIL PROCEDURE

DECREE ABSOLUTE

72.24(1) A motion for a decree absolute shall be made to a judge by filing a notice of motion in the office in which the action was commenced, on any day after the expiration of the period that must intervene before the granting of the decree absolute.

(2) The moving party shall file with the notice of motion,

(a) the original or a certified copy of the decree nisi with proof of service on the party against whom it was granted, unless service was dispensed with; and

(b) an affidavit, sworn after the expiration of the period that must intervene before the decree absolute may be granted, stating whether,

(i) an appeal from the decee nisi is pending or has been abandoned or dismissed;

(ii) an order has been made extending the time for appealing from the decree nisi and, if so, whether the time has expired without an appeal being taken; and

(iii) a notice of motion to show cause why the decree absolute should not be granted has been filed or served.

(3) The registrar shall present the notice of motion and the material filed in support to a judge [sitting anywhere in Ontario], who may grant a decree absolute, without the appearance of counsel, and so endorse the notice of motion.

COMMENTS

72.24

- Working Group agrees with CAB that a minimum period should be provided for after service of the decree nisi and before the absolute is applied for. We suggest a new 72.24(1) as follows:

  "A motion for a decree absolute may be made after the expiration of the time provided in the decree nisi whichever is the later."

- Does the Sub-committee want this added?

72.24(1) and (2)

- Williston reorganized for greater clarity.

72.24(3)

- L.R. and 10 day time limit deleted. As a practical matter, the registrar presents the applications as promptly as possible, and the 10 day period may sometimes be insufficient (where for example a Supreme Court judge may not be locally available for two weeks).

WILLISTON'S PROPOSED RULES

72.24(1)

72.24 Decree Absolute

(1) A motion to make a Decree Nisi absolute shall be made to a judge by filing in the office in which the proceeding was commenced, on any day after the expiration of the period that must intervene before the Decree Nisi may be made absolute, a notice of motion, together with the original Decree Nisi, or a certified copy thereof, and proof of service thereof on the party against whom it was granted, unless such service was dispensed with.

(2) Any such motion shall be supported by an affidavit, sworn after the expiration of the period that must intervene before the Decree Nisi may be made absolute, as to whether or not,

(a) an appeal from the Decree Nisi is pending or any appeal taken has been abandoned or dismissed;

(b) an order has been made extending the time for appealing from the Decree Nisi and, if so, whether such time has expired without an appeal having been taken; and

(c) a Notice of Motion to show cause why the Decree Nisi should not be made absolute has been filed or served.

(3) Within 10 days thereafter the registrar shall cause the Notice of Motion and the material filed in support thereof to be presented to a judge sitting anywhere in Ontano, who may pronounce a Decree making the Decree Nisi absolute, without the appearance of counsel, and so endorse the Notice of Motion.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		72.24(4)
(4) Where a judge decides that a decree absolute should not be granted without the appearance of counsel, the judge shall adjourn the motion and direct that notice of the adjournment be given by the registrar to the party seeking the decree absolute and may direct that notice of the motion be served on any other person.	72.24(4) - L.R.	(4) Where a judge decides that a Decree Nisi should not be made absolute without the appearance of counsel, he shall adjourn the motion and direct that notice of such adjournment be given by the registrar to the applicant and may direct that the applicant serve notice of the motion on any other person.
(5) In the decree absolute (Form 72J), only the names of the spouses shall appear in the title of the proceeding unless the decree absolute was granted at the trial and grants some relief against a respondent who is not the petitioner's spouse.	72.24(5) - Williston expanded for clarity.	(5) The style of cause in the Decree Absolute (Form 72J) shall be the same as in the Decree Nisi.
(6) Where a decree absolute has been granted, the registrar shall prepare, sign and enter the decree.		(6) Where a Decree Absolute has been granted, the registrar shall prepare, sign and enter the Decree.
(7) Where a party to whom a decree nisi has been granted fails to move for a decree absolute within one month after the earliest date on which they could have done so, the opposite spouse may move for a decree absolute, on notice to the party to whom the decree nisi has been granted, but without filing proof of service of the decree nisi, and where the decree nisi has not been settled, signed or entered, the judge, on the hearing of the motion, may direct this to be done.	72.24(7) - L.R.	(7) Where a party to whom a Decree Nisi has been granted fails to apply to have the Decree made absolute within one month after the earliest date on which he could have done so, the opposite spouse may apply to have the Decree Nisi made absolute, on notice to the party to whom the Decree Nisi has been granted, but without filing proof of service of the Decree Nisi. Where the Decree Nisi has not been settled, signed or entered, the judge, on the hearing of the motion, may direct this to be done.

REVISED RULES OF CIVIL PROCEDURE

INTERIM COROLLARY RELIEF

Time for Service of Notice of Motion

72.25(1) A notice of motion for interim relief under the *Divorce Act* (Canada) may be served at the same time as or at any time after the petition or counter-petition is served.

Pre-motion Conference

(2) At the hearing of a motion for interim relief under the *Divorce Act* (Canada), the court may direct a pre-motion conference to consider the possibility of settling any or all of the issues raised by the motion.

(3) The costs of a pre-motion conference shall be costs in the cause, unless otherwise ordered.

(4) A judge or officer who conducts a pre-motion conference under subrule (2) shall not hear the motion for interim relief [except with the consent of the parties].

COMMENTS

72.25

- Sub-heading added before (1), (2), (5), (6) and (7) to add clarity and ease of reference. Williston 72.25 (8), (9) and (10) made subject of separate sub-rule (new 72.26) since they deal with variation, not "Interim Corollary Relief".

72.25(1)

- Reference to "interim relief under the Divorce Act" instead of "interim corollary relief" since the only interim relief available under that statute is "corollary relief". Old term kept in heading to service as familiar sign post.

72.25(2)

- "Pre-motion Conference" thought to be more accurate.

72.25(3)

- Rather than import all of R.50 (much of which is irrelevant and/or inappropriate) Working Group suggests specific repetition of just the costs provision.

72.25(4)

- Bracketed words added for discussion and Sub-committee is reminded that they were deleted in R.50 (pre-trial conferences). Should the same not apply here?

WILLISTON'S PROPOSED RULES

72.25(1)

72.25 Corollary Relief

(1) A Notice of Motion for interim relief under the *Divorce Act (Canada)* may be served with a Petition or Counter-Petition or at any time thereafter.

(2) At the hearing of a motion for interim relief under the *Divorce Act (Canada)*, the court shall consider whether or not a pre-trial conference is necessary or desirable at that stage of the proceeding and may conduct a pre-trial conference before disposing of the motion

(3) Rule 50 shall apply, with any necessary modification, to a pre-trial conference under paragraph (2).

(4) Except with the consent of the parties, the judge or officer who conducts the pre-trial conference under paragraph (2) shall not proceed with the motion for interim relief.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		72.25(5)
Costs on Interim Motion (5) In exercising their discretion as to costs, the judge or officer who hears a motion for interim relief shall take into account any offer to settle the claim for interim relief or the failure to make such an offer.	72.25(5) - L.R.	(5) In exercising his discretion as to costs, the judge or officer who hears a motion for interim relief under paragraph (1) shall take into account any offer to settle the claim for interim relief or the failure to make such an offer.
Failure to Comply with Interim Order (6) Where a party fails to comply with an order for interim relief under the *Divorce Act* (Canada) and the court is satisfied that the party is able to comply with the order, the court may postpone the trial of the action or strike out any pleading or affidavit of the party in default.	72.25(6) - L.R.	(6) Where a party fails to comply with an order for interim relief under the *Divorce Act (Canada)* and the court is satisfied as to the ability of such party to comply with the order, the trial of the proceeding may be postponed or an order may be made striking out any pleading or affidavit of the party in default.
Appeal (7) The procedure on an appeal from an order for interim relief made in a divorce action to a single judge of the Court of Appeal is governed by rule 63.01 (appeal from interlocutory order of a master, local master or other officer), with necessary modifications.	72.25(7) - Redrafted to reflect procedural nature of rule. The substantive right to appeal is given by the Divorce Act. The procedure of R.63.01 is thought to be more appropriate than that of R.62, since it is simpler and more summary and better suited to the nature of such appeals.	(7) An appeal from an order for interim relief in respect of any claim made in a divorce proceeding shall be to the Court of Appeal without leave, and shall be heard by one justice of appeal.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		72.26(1)
VARIATION OF FINAL ORDER FOR COROLLARY RELIEF		
72.26(1) A person who seeks to vary or rescind an order under section 11 of the *Divorce Act* (Canada) for maintenance, custody or access, or to obtain such an order after the decree absolute, shall do so by notice of application.	72.26(1) - L.R. to provide for cases in which variation is sought to order maintenance where decree was silent on that matter.	72.25 (8) An application to vary or rescind an order for corollary relief granted at the trial shall be made to a judge sitting at the place named by the applicant in his Notice of Application, unless otherwise ordered by the court.
(2) Where the application under subrule (1) is in respect of custody or maintenance, the applicant shall deliver a financial statement (Form 72H) with the notice of application.	- Note contrast to present R.812(1) on where application must be brought at present. Working Group retains Williston's broader approach. - Reference to notice of application is intended to settle clearly the nature of such a step: it is an originating process.	(9) An applicant for an order to vary or rescind an order for corollary relief granted at the trial, other than an order for access to children, shall deliver a financial statement in Form 72H with the Notice of Application. (10) The judge to whom such an application is made may order the respondent to deliver a financial statement in Form 72H within such time as may be prescribed in the order.
	72.26(2) - L.R.	
(3) A judge may order the respondent in an application in respect of custody or maintenance to deliver a financial statement (Form 72H) within such time as is prescribed in the order.	72.26(3) - L.R. Judge's order required to prevent application lauched solely to force respondent to disgorge up-dated financial statement.	

REVISED RULES OF CIVIL PROCEDURE

REGISTRATION OF ORDERS FOR COROLLARY RELIEF

72.27(1) Where an order has been made by any other superior court in Canada under section 10 or 11 of the *Divorce Act* (Canada), the order may be registered under section 15 of the Act by filing a certified copy of the order in the office of the Registrar of the Supreme Court, and it shall then be entered as an order of the court.

(2) The certified copy of the order may be filed with the Registrar of the Supreme Court by forwarding it to him by ordinary mail, accompanied by a written request that it be registered under section 15 of the Act.

COSTS

72.28 On the assessment of costs in a divorce action the action shall be treated as uncontested and the costs shall be assessed in accordance with Tariff B, unless the trial judge

COMMENTS

72.27(1)

- Williston 72.26(1), L.R.

72.27(2)

- L.R. Reference to money deleted: governed by regulations to Administration of Justice Act.

72.28

- Williston 72.27, L.R.

WILLISTON'S PROPOSED RULES

72.27(1)

72.26 Registration of Orders for Corollary Relief

(1) Where an order has been made by any other superior court in Canada under Sections 10 or 11 or the *Divorce Act (Canada)*, the registration of such order pursuant to Section 15 of the said Act shall be effected by filing an exemplification or certified copy of the order in the office of the Registrar of the Supreme Court, whereupon it shall be entered as an order of the court.

(2) The exemplification or certified copy of the order may be filed with the Registrar by forwarding it to him by ordinary mail, accompanied by,

(a) a written request that it be registered pursuant to the said Act; and

(b) a certified cheque or money order in the amount of $5.00.

72.27 Costs

On the taxation of costs in a divorce proceeding, the proceeding shall be treated as uncontested, and such costs shall be taxed in accordance with Tariff "B" unless the trial judge otherwise directs.

REVISED RULES OF CIVIL PROCEDURE

RULE 73 FAMILY LAW PROCEEDINGS

APPLICATION OF THE RULES

73.01 Rules 73.02 to 73.10 apply to proceedings under the *Family Law Reform Act* and Part IV of the *Children's Law Reform Act*.

DEFINITIONS

73.02 In rules 73.03 to 73.10,

(a) "applicant" includes a plaintiff, a plaintiff by counterclaim, a petitioner and a counter-petitioner for divorce;

(b) "originating process" means a statement of claim, counter-claim, petition for divorce, counter-petition for divorce or notice of application;

(c) "respondent" includes a defendant; and

(d) "responding document" means a statement of defence, a defence to counterclaim, an answer to a petition for divorce, an answer to a counter-petition for divorce or an affidavit in opposition to a notice of application.

HOW COMMENCED

73.03(1) A proceeding under the *Family Law Reform Act* or the *Children's Law Reform Act* may be commenced by an originating process.

(2) Where the Ministry of Community and Social Services or a municipality is an applicant for an order for the support of a dependant, the applicant shall serve the originating process on the dependant.

COMMENTS

RULE 73 FAMILY LAW PROCEEDINGS

Title

- Title amended to reflect application of rule to both FLRA and CLRA.

73.01

- New. Renders rules applicable to both Acts.

73.03(2)

- L.R.

WILLISTON'S PROPOSED RULES

73.01

RULE 73 FAMILY LAW REFORM ACT PROCEEDINGS

73.01 Definitions

In this rule,

Act means *The Family Law Reform Act, 1978;*

applicant means a person making an application under the Act and includes a plaintiff, a plaintiff by counterclaim, a petitioner and a counter-petitioner for divorce;

originating process means a statement of claim, counter-claim, petition for divorce, counter-petition for divorce or notice of application that initiates an application under the Act;

respondent includes a defendant; and

responding document means a statement of defence, a defence to counterclaim, an answer to a petition for divorce, an answer to a counter-petition for divorce or an affidavit in opposition to a notice of application.

73.02 How Commenced

(1) An application under the Act may be commenced by the filing of an originating process.

(2) Where the Ministry of Community and Social Services or a municipality makes an application under the Act for an order for the support of a dependant, the applicant shall serve upon the dependant a copy of the originating process.

REVISED RULES OF CIVIL PROCEDURE

FINANCIAL STATEMENTS

Applicant's Financial Statement

73.04(1) Where an order is sought under section 4, (division or family or non-family assets), 18 (support or 21 (variation of support) of the *Family Law Reform Act*, or for custody under section 28 of the *Children's Law Reform Act*, a financial statement (Form 72H) shall be delivered with the originating process, together with a notice to file financial statement (Form 73A).

Respondent's Financial Statement

(2) A resondent served with the applicant's financial statement and notice to file financial statement shall deliver a financial statement with their responding document.

(3) Where a respondent does not intend to defend an application, they shall nevertheless deliver a financial statement within the time limited for the delivery of their responding document.

(4) Where a respondent fails to comply with a notice to file financial statement, the applicant may move without further notice to the respondent for an order requiring the delivery of a financial statement within the time prescribed by the order.

COMMENTS

73.04(1)

- Term "Financial Statements" is simpler, and is also used in Divorce Proceedings (R.72).
- "Notice to File Financial Statement" required here although not in divorce proceeding because form of divorce petition itself contains notice to respondent in proper case.

73.04(2)

- L.R.

73.04(3)

W. 73.03(4) L.R.

73.04(4)

W. 73.03(5) L.R.

WILLISTON'S PROPOSED RULES

73.04(1)

73.03 Statements of Financial Information

(1) Where an application is made under Sections 4, 18 or 21 of the Act, a Financial Statement (Form 72H) shall be delivered with the originating process, together with a Notice to File Financial Statement (Form 73A).

73.03(2) A party served with the Financial Statement of the applicant and Notice to File Financial Statement shall deliver his own Financial Statement with his responding document.

(4) Where a respondent does not intend to defend an application, he shall nevertheless deliver his Financial Statement within the time limited for the delivery of his responding document.

73.03(5) Where a respondent fails to comply with a Notice to File Financial Statement the applicant may apply to the court without further notice to the respondent for an order requiring the delivery of such a statement within the time prescribed by the order.

REVISED RULES OF CIVIL PROCEDURE

Where Financial Statement Missing

(5) Where a financial statement is required to be delivered with an originating process or a responding document, the originating process or the responding document shall not be accepted by the registrar for filing without the financial statement.

Cross-examination

(6) A party who has delivered a financial statement may be cross-examined on it,

(a) for use on the hearing of the application, where the proceeding was commenced by a notice of application;

(b) for use on a pending motion for interim relief, in which case the cross-examination may also be used in evidence at the hearing of the application as if it were taken for that purpose, or at the trial in the same manner as an examination for discovery; or

(c) on examination for discovery.

Divorce Action

(7) In a divorce action, this rule does not apply to a party against whom no claim is made under the *Family Law Reform Act* or the *Children's Law Reform Act*.

COMMENTS

73.04 (5)

W. 73.03 (3) L.R.

73.04(6)

- L.R.

73.04(7)

- L.R. to convey meaning Williston is thought to have intended.

WILLISTON'S PROPOSED RULES

73.04(5)

73.03 (3) Where a Financial Statement is required to be delivered with an originating process or a responding document, the originating process or the responding document shall not be accepted by the registrar for filing without the Financial Statement.

73.03(6) A party may be cross-examined on his Financial Statement,

(a) for use upon the hearing of the application where the proceeding was commenced by a Notice of Application; or

(b) for use upon a pending motion for interim relief, in which case the cross-examination may be used in evidence at the hearing of the application as if it were taken for that purpose, or at the trial in the same manner as an examination for discovery; or

(c) on his examination for discovery.

73.03 (7) In a divorce proceeding, this sub-rule only applies to the petitioner and the respondent spouse in a petition or counter-petition.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
	Williston 73.04 - Rule deleted by virtue of policy decision by A.G. not to provide for separate representation for children. That decision was principally based upon the anticipated public cost of such a provision. - Note from Working Group: apart from the separate representation of children, can the mediation and assessment provisions be retained? Their value in such cases is obvious and the expense thereof might be managed by including a sub-rule providing that the costs of such procedures shall be disposed of by the Court when ordering them (as in Williston 73.04(4)).	73.04 Custody and Access Disputes (1) *Separate Representation for Children* In any proceeding where the custody of or access to a child is in issue, the court may, where it appears necessary in the interests of the child so to do, order that any such child be separately represented in a proceeding by a solicitor appointed by the court. (2) *Mediation* (a) In any proceeding where the custody of or access to a child is in issue, the court may, at any time and upon such terms as may seem just, appoint a qualified person to act as a mediator for the purpose of assisting the parties to resolve, by agreement, any issue concerning the custody of, or access to, a child. (b) Any communication made in the course of the mediation process shall be privileged and no report of the mediator shall be admitted in evidence nor shall he be called as a witness at the trial or hearing of the proceeding. (3) *Assessment* (a) In any proceeding where the custody of or access to a child is in issue, the court may, at any time and upon such terms as may seem just, appoint a qualified person to assess the needs of the child and the ability of any persons to meet those needs to whom the custody of or access to the child might be awarded, and order the child and any such persons to attend before the person so appointed. (b) Any person appointed by the court to make such an assessment shall file a full report of his assessment with the court and serve a copy thereof on each of the parties to the proceeding within the time prescribed by the order appointing him. (c) Any such person may be a witness in the proceeding and, if called as a witness, shall be subject to cross-examination by any party to the proceeding. (4) *Remuneration* The court may fix the remuneration of any person appointed under this sub-rule, and shall determine the liability of the parties for the remuneration of any such person.

REVISED RULES OF CIVIL PROCEDURE

PLACE OF TRIAL OR HEARING

73.05(1) The applicant shall name as the place of trial or hearing of a proceeding,

(a) under the *Children's Law Reform Act* or under that Act and the *Family Law Reform Act*, a place where the court normally sits in the county in which the child ordinarily resides; or

(b) under the *Family Law Reform Act* only, a place where the court normally sits in a county in which any of the parties ordinarily resides,

subject to subrule (2).

(2) Where the application is made in a divorce action, the place of trial is governed by rule 72.17.

(3) Subrules 72.17(2) and (3) (change of place of trial) apply, with necessary modifications, to a motion to change the place of trial or hearing of an application and, for that purpose, a proceeding commenced by notice of application shall be treated as if it was an action.

COMMENTS

73.05(1) and (2)

- Sub-rule divided, substance retained: plain application under FLRA or CLRA governed by R.45: aplication brought in concert with divorce action governed by divorce rule.

73.05

- Based on W.73.05. See existing rules 775f and 245. The Working Group proposes for consideration a new basic rule for the place of trial in custody, access and guardianship cases, namely, where the child ordinarily resides. This is proposed because the evidence necessary to ascertain the child's best interests is likely to come from teachers, doctors and neighbour in the child's home community. If the Sub-committee wishes, this rule could be made applicable to custody claims in divorce actions by amending 72.17.

- The rule for claims not involving a child parallels the existing rule and the rule for divorces (72.17).

WILLISTON'S PROPOSED RULES

73.05(1)

73.05 Place of Trial or Hearing

Except where the application is made in a divorce proceeding, the place of trial or hearing of an application under the Act shall be governed by the provisions of Rule 45 and, for the purposes of that rule, an application under the Act made by notice of application shall be treated as if it was an action, whether it is made in the Supreme Court or in a county court.

REVISED RULES OF CIVIL PROCEDURE

REFERENCE TO A FAMILY LAW COMMISSIONER

73.06 Rule 72.21 (reference to family law commissioner) applies, with necessary modifications, to any question or issue arising under the *Family Law Reform Act* or the *Children's Law Reform Act*.

INTERIM RELIEF

73.07 Rule 72.25 (interim corollary relief) applies, with necessary modifications, to a motion for interim relief under the *Family Law Reform Act* or the *Children's Law Reform Act*.

WHERE PROCEEDING IS TRANSFERRED

73.08(1) Where a proceeding is transferred from a provincial court (family division) to a county court or the Supreme Court, under subsection 2(2) of the *Family Law Reform Act* or section 67 of the *Children's Law Reform Act* the proceeding shall continue without duplication of any steps taken before the transfer unless the court to which the proceeding is transferred directs otherwise.

(2) The court to which a proceeding is transferred may, on motion, give directions for the conduct of the proceeding.

(3) An interim order made by a provincial court (family division) in a proceeding before its transfer remains in force according to its terms, unless the court to which the proceeding is transferred orders otherwise.

COMMENTS

73.06

- L.R.

73.07

- Since the procedure is substantially identical, the divorce rule is adopted by reference.

73.08(1)

- L.R. to make meaning clearer.

73.08(2)

- L.R.

73.08(3)

- L.R.

WILLISTON'S PROPOSED RULES

73.06

73.06 Reference to a Family Law Commissioner

The provisions of Rule 72.21 shall apply, with any necessary modification, to any question or issue arising under the Act.

73.07 Interim Relief

(1) A Notice of Motion for interim relief under the Act may be served with an originating process or at any time thereafter.

(2) At the hearing of a motion for interim relief under the Act, the court shall consider whether or not a pre-trial conference is necessary or desirable at that stage of the proceeding and may conduct a pre-trial conference before disposing of the motion.

(3) Rule 50 shall apply, with any necessary modification, to a pre-trial conference under paragraph (2).

(4) Except with the consent of the parties, the judge or officer who conducts the pre-trial conference under paragraph (2) shall not proceed with the motion for interim relief.

(5) In exercising his discretion as to costs, the judge or officer who hears a motion for interim relief under paragraph (1) shall take into account any offer to settle the claim for interim relief or the failure to make such an offer.

(6) Where a party fails to comply with an order for interim relief under the Act and the court is satisfied as to the ability of such party to comply with the order, the trial or hearing of the application may be postponed or an order may be made striking out any pleading or affidavit of the party in default.

73.08 Where Proceeding is Transferred

(1) Where a proceeding is transferred to a court having other jurisdiction under sub-section 2 of Section 2 of the Act, the proceeding shall continue in that court without duplication of any steps taken prior to the transfer unless that court otherwise directs.

(2) A court to which a proceeding is transferred may, on application, give directions for the conduct of the proceeding.

(3) Any interim order made in a proceeding prior to a transfer to a court having other jurisdiction shall remain in force according to its terms, unless the court otherwise orders.

REVISED RULES OF CIVIL PROCEDURE

APPEAL FROM PROVINCIAL COURT (FAMILY DIVISION)

Commencement of Appeal

73.09(1) An appeal from a provincial court (family division) to a county court shall be commenced by serving a notice of appeal (Form 62A) [on all parties whose interests are affected by the appeal], within fifteen days after the date of the order appealed from.

Filing Notice of Appeal

(2) The notice of appeal shall be filed with proof of service within five days after it is served.

Grounds to be Stated

(3) The notice of appeal shall state the relief sought and shall set out the grounds of appeal [and no other grounds may be argued except by leave of the court.]

Appeal Record

(4) The appellant shall, at least ten days before the hearing of the appeal, file with the clerk of the county court and serve on each respondent an appeal record containing,

(a) a table of contents;

(b) a copy of the notice of appeal;

(c) a copy of the order appealed from and any reasons given by the judge who made the order;

(d) a factum consisting of a concise statement without argument, of the facts and law relied on by the appellant;

(e) a transcript of the evidence;

(f) such other material as is necessary for the hearing of the appeal.

COMMENTS

73.09

- Title redrafted.

73.09(1)

- L.R. Appeal commenced by serving notice of appeal as in R.62 Form provided for.

73.09(2)

- Added to align with R.62 (new).

73.09(3)

- L.R. Words in square brackets do not appear in R.62 or 63. Should they be here?

73.09(4)

- L.R.

WILLISTON'S PROPOSED RULES

73.09(1)

FAMILY LAW REFORM ACT PROCEEDINGS

73.09 Appeal to County Court from Provincial Court

(1) An appeal to a county court under the Act shall be made by notice of appeal served upon all parties whose interests are affected by the appeal within 15 days after the date of the order appealed from.

(2) The notice shall state the relief asked for and shall set forth the grounds of appeal and no other grounds may be argued except by leave of the court.

(3) The appellant shall, at least 10 days before the hearing of the appeal, file with the clerk of the appropriate county court and serve upon each respondent a record containing,

(a) an index;

(b) the notice of appeal;

(c) the order appealed from and any reasons given by the judge who made the order;

(d) a concise statement, without argument, of the facts and law relied on by the appellant;

(e) a transcript of the evidence;

(f) such other material as is necessary for the due hearing of the appeal.

REVISED RULES OF CIVIL PROCEDURE

Respondent's Factum

(5) Each respondent shall, at least three days before the hearing of the appeal, file with the clerk and serve on each of the other parties to the appeal a factum consisting of a concise statement, without argument, of the facts and law relied on by the respondent.

Dispensing with Compliance

(6) A judge of the county court may, before or at the hearing of the appeal, dispense with compliance with this rule in whole or in part.

WARRANT FOR ARREST

73.10 The warrant for the arrest of a debtor or respondent referred to in section 24 of the *Family Law Reform Act* shall be in Form 73B.

RECOGNIZANCE

73.11 A recognizance entered into under an order made under section 34 of the *Family Law Reform Act* shall be entered into before the registrar or such other officer as a judge directs.

COMMENTS

73.09(5)

- L.R.

73.09(6)

- ——

73.10

- Specific reference to FLRA added.

Williston 73.11(2) deleted in accordance with the sub-committee's decision that any provisions for the enforcement of fines or recognizances should appear in the statute.

WILLISTON'S PROPOSED RULES

73.09(5)

73.09 (4) Each respondent shall, at least 3 days before the hearing of the appeal, file with the clerk and serve on each of the other parties to the appeal one copy of a concise statement, without argument, of the facts and law relied on by the respondent.

(5) A judge of the county court may, before or at the hearing of the appeal, dispense with compliance with this rule either in whole or in part.

73.10 Warrant for Arrest

The warrant for the arrest of a debtor or respondent referred to in Section 24 of the Act shall be in Form 73B.

73.11 Recognizance

(1) A recognizance entered into under an order made pursuant to Section 34 of the Act shall be in Form 73C and shall be entered into before the registrar or such other officer of the court as a judge may direct.

(2) Where a party is in breach of a condition of the recognizance, a judge, on the application of an opposite party or of the Attorney General, may order that a Writ of Seizure and Sale be issued to enforce the recognizance.

REVISED RULES OF CIVIL PROCEDURE

RULE 74 CHILD WELFARE ACT PROCEEDINGS

DEFINITION

74.01 In rule 74.02 "Act" means the *Child Welfare Act*.

APPEAL FROM PROVINCIAL COURT (FAMILY DIVISION)

Commencement of Appeal

74.02(1) An appeal from a provincial court (family division) to a county court under section 43 or 84 of the Act shall be commenced by serving a notice of appeal (Form 62 A) on the clerk of the court that made the decision, within thirty days after the date of decision appealed from.

Service of Notice of Appeal

(2) The appellant shall serve the notice of appeal by mail on,

(a) all other persons entitled to appeal the decision; and

(b) in the case of an appeal under section 43 of the Act, all other persons entitled to notice of a hearing under subsection 28(7) of the Act who appeared at the hearing.

Filing Notice of Appeal

(3) The notice of appeal shall be filed with proof of service within five days after it is served.

Grounds to be Stated

(4) The notice of appeal shall state the relief sought and shall set out the grounds of appeal, [and no other grounds may be argued except by leave of the court.]

COMMENTS

RULE 74 CHILD WELFARE ACT PROCEEDINGS

74.01

- L.R.

74.02

- Heading redrafted to be more specific.

74.02(1)

- L.R. and made consistent with R.73 and R.62 in method of commencing appeal.

74.02(2)

- L.R.

74.02(3)

- Added.

74.02(4)

- L.R.

WILLISTON'S PROPOSED RULES

74.01

RULE 74 CHILD WELFARE ACT PROCEEDINGS

74.01 Definition

In this rule,

Act means *The Child Welfare Act, 1978.*

74.02 Appeals to a County Court

(1) An appeal to a county court under Sections 43 and 84 of the Act shall be made by notice of appeal served by the appellant within 30 days after the making of the decision being appealed upon the clerk of the court that made the decision and filed, with proof of service, with the clerk of the county court within 5 days after such service.

(2) Upon the filing of the notice of appeal, the appellant shall mail a copy of the notice of appeal to,

(a) all other persons entitled to appeal the decision; and

(b) in the case of an appeal under Section 43 of the Act, all other persons entitled to notice of a hearing under sub-section 7 of Section 28 of the Act who appeared at the hearing.

(3) The notice of appeal shall state the relief asked, and shall set forth the grounds of appeal, and no other grounds may be argued except by leave of the court.

Revised Rules of Civil Procedure

Appeal Board

(5) The record on the appeal shall be the record prepared for the purpose of the appeal under the rules of the provincial courts (family division) by the clerk of the court from which the appeal is taken and sent by the clerk to the county court and shall include,

(a) a table of contents;

(b) a copy of the notice of appeal;

(c) a copy of the decision appealed from and any reasons given by the judge who made the decision;

(d) a transcript of the evidence; and

(e) such other material as is necessary for the hearing of the appeal.

Hearing Date

(6) The appeal shall be heard within thirty days after the filing of the transcript of the evidence.

Dispensing with Compliance

(7) Subject to subsections 43(7) and 84(5) (extension of time for appeal) of the Act, the judge of the county court may, before or at the hearing of the appeal, dispense with compliance with this rule in whole or in part.

Comments

74.02(5)

- L.R.

74.02(7)

- L.R.

Williston's Proposed Rules

74.02(5)

(4) The record on the appeal shall contain the material prepared for the purpose under the rules of the provincial courts (family division) and sent to the county court by the court that made the decision, and shall include,

(a) an index;

(b) a copy of the notice of appeal;

(c) a copy of the decision being appealed and any reasons given by the court that made the decision;

(d) a transcript of the evidence; and

(e) such other material as is necessary for the hearing of the appeal.

(5) The appeal shall be heard within 30 days after the filing of the transcript of the evidence.

(6) Subject to sub-section 7 of Section 43 and sub-section 5 of Section 84 of the Act, a judge of the county court may dispense with compliance with this sub-rule either in whole or in part.

Revised Rules of Civil Procedure	Comments	Williston's Proposed Rules
		74.03(1)
APPEAL FROM UNIFIED FAMILY COURT 74.03(1) Rules 74.01 and 74.02 apply, with necessary modifications, to an appeal under section 43 or 84 of the Act from the Unified Family Court to a judge of the Supreme Court as provided in subsection 15(2) of the Unifed Family Court Act (2) The appeal shall be heard at Toronto or any other place where a judge of the Supreme Court is available to hear motions.	74.03 - Added to provide for UFC appeals. Only Hamilton now has UFC, but it may be established elsewhere in time.	

REVISED RULES OF CIVIL PROCEDURE

RULE 75 PAYMENT INTO AND OUT OF COURT

DEFINITION

75.01 In rules 75.02 to 75.05, "accountant" means,

(a) where money is to be paid into or out of the Supreme Court, the Accountant of the Supreme Court; or

(b) where money is to be paid into or out of a county court, the clerk of the county court.

COMMENTS

Rule 75 PAYMENT INTO AND OUT OF COURT

Title

The title of Williston Rule 75 has been changed to reflect the fact that the Rule deals more with the mechanics of payment than with the office of the Accountant in this case only.

75.01

- The definition section has been added to make it clear that the rule applies to county courts and also to make it clear that in the county courts, the responsible official is the clerk of the court.

- Some readers of Williston Rule 75.01 took the intention of the Williston Committee to be centralization of county court accounts in Toronto. Apparently this was not intended, and the Ministry of the Attorney General feels that centralization would not be desirable in the interests of service to the public and the profession. This draft makes it clear that no centralization is intended.

WILLISTON'S PROPOSED RULES

75.01

RULE 75 OFFICE OF THE ACCOUNTANT

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		72.02(1)
PAYMENT INTO COURT 75.02(1) A party who seeks to pay money into court shall file with the accountant or, where the payment is to be made into the Supreme Court outside Toronto, with the local registrar, a requisition for payment in and, (a) a certified copy of the order or report; or (b) a copy of the offer to settle or acceptance of offer, under which the money is payable.	75.02(1) - W75.01(3), revised. The revision adds a requisition for payment into the documentation that must be filed and recognizes that payments into court may be made under an offer to settle or acceptance of offer.	75.01 (3) Any person applying for a direction to the bank shall file with the Accountant or the appropriate registrar a certified or authenticated copy of the judgment, order or report under which the money is payable. Where the direction to the bank is obtained elsewhere than in Toronto, such documents shall be sent to the Accountant forthwith.
(2) On receipt of the material referred to in subrule (1), the accountant or registrar shall provide the party with a direction to receive the money addressed to the bank into which the money is to be paid.	75.02(2) - Based on W75.01(2).	75.01 (2) Any person paying money into court shall obtain from the Accountant or the appropriate registrar a direction to the bank to receive the money.
(3) Where the direction is obtained from a registrar in a Supreme Court proceeding, the registrar shall forthwith send to the accountant the material filed under subrule (1).	75.02(3) - Based on part of W75.01(3).	

REVISED RULES OF CIVIL PROCEDURE

(4) The party paying the money into court shall pay it into an account in the name of the accountant in a chartered bank, in accordance with the direction.

(5) On receiving the money, the bank shall give a receipt to the party paying the money in and shall forthwith send a copy of the receipt to the accountant.

(6) A party paying into court under an offer to settle or acceptance of offer shall forthwith serve a notice of payment into court (Form 75A) on every interested party, but the notice shall not be filed.

COMMENTS

75.02(4)

- See W75.01(1). More than one bank is used in the various county towns around the province, and there seemed no good reason to have the commercial for one bank in the rules of civil procedure. The body paying money into court will have all the information needed in the direction provided by the court office.

75.02(5)

- W75.01(4), LR

75.02(6)

- New, based on the notice of payment in procedure that exists today and as proposed by W48.03. Is there any need for a notice of payment into court under an offer or acceptance? Where notification is called for, would the parties not do this on their own?

WILLISTON'S PROPOSED RULES

75.02(4)

75.01 Payment into Court

(1) All money to be paid into court shall be paid into the Canadian Imperial Bank of Commerce at Toronto or into some branch of that bank or into some other chartered bank designated for that purpose from time to time by the Lieutenant Governor in Council.

(4) On receiving the money, the bank shall give a receipt therefor in duplicate. One copy of the receipt therefor in duplicate. One copy of the receipt shall be delivered to the person making the deposit, and the other shall be mailed or delivered to the Accountant the same day.

75.01 (5) Any person paying money into court is entitled to credit therefor as of the date on which it was deposited.

REVISED RULES OF CIVIL PROCEDURE

PAYMENT OUT OF COURT

Payment Out under Order or Report

75.03(1) A party who seeks payment of money out of court in accordance with an order or report shall file with the accountant,

(a) a requisition for payment out;

(b) a certified copy of the order or report; and

(c) an affidavit stating that the time prescribed for an appeal has expired and no appeal is pending,

and the accountant may then pay the money out to the party in accordance with the order or report.

Payment Out on Consent

(2) A party who seeks payment out of court of money paid in under an offer to settle or acceptance of offer or as security for costs shall file with the accountant,

(a) a requisition for payment out;

(b) the consent of all parties or their solicitors; and

(c) an affidavit stating that all parties have consented to the payment and that neither the party who paid the money into court nor the party to whom it is to be paid is under a disability,

and the accountant may then pay the money out to the party in accordance with the consent.

COMMENTS

72.03(1)

- W75.02(1) LR

72.03(2)

- New, based on the procedure for acceptance of money paid into court in satisfaction. See W48.08(3).

WILLISTON'S PROPOSED RULES

75.03(1)

75.02 Payment out of Court

(1) Any person entitled to payment of money out of court shall file with the Accountant a request therefor in writing, together with a certified or authenticated copy of the judgment, order or report entitling him to the money and, where there is a right of appeal therefrom, an affidavit that the time limited for appeal has expired and that no appeal has been set down.

48.08 (3) Where the money paid into court in satisfaction has been accepted, all further proceedings in the action or in respect of the specified claim or claims, as the case may be, shall be stayed and the money shall not be paid out except upon the filing of an affidavit of the plaintiff, or his solicitor, that the plaintiff is not under disability and is personally entitled to the money, or by the order of a judge.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		75.03(3)
Payment Out of Interest (3) Money paid out of court under subrule (1) or (2) shall be paid out with accrued interest unless the order, report or consent provides otherwise.	75.03(3) - New. Requested by the accountant of the Supreme Court, as otherwise an order is needed to deal with payment out of interest accrued on money in court.	
Consent by Insurer on Behalf of Party (4) Where the insurer of a party has paid money into court on behalf of the party and an affidavit setting out the relevant facts is filed with the accountant, the consent required by clause (2) (b) may be given by the insurer on behalf of the party and the money may be paid to the insurer.	75.03(4) - Based on part of W58.08, which was inserted in the wrong place in the Williston report. The intention was that the insurer of a party who had made a payment into court should be able to give any necessary consents for payment out and, in the appropriate case, get the money back out without requiring the insured, who was in fact unaware of the litigation, to be involved.	**58.08 Payment Out** Any monies paid into court as security for costs may be paid out on the consent of the solicitors for the parties concerned without order, and may be paid to the solicitor for either party upon production of the consent of his client verified by affidavit. Where the money has been paid into court by or on behalf of an insurer of one or more of the parties, the consent of the client may be given by such insurer.
Minor Attaining Age of Majority (5) Money in court to which a party is entitled under an order when the party attains the age of majority may be paid out with accrued interest to the party on filing with the accountant, (a) a requisition for payment; and (b) an affidavit proving the identity of the party and that the party has attained the age of majority.	75.03(5) - W75.02(3), L.R.	75.02 (3) Unless otherwise ordered, any money in court to the credit of a minor and to which he is entitled on attaining his majority shall be paid out to him with accrued interest upon application to the Accountant supported by an affidavit proving the age and identity of the minor to the satisfaction of the Accountant.

REVISED RULES OF CIVIL PROCEDURE	COMMENTS	WILLISTON'S PROPOSED RULES
		75.03(6)
Payment directly to Solicitor (6) Where money has been paid into court as security for costs or an order has been made for payment of costs out of money in court, the money may be paid out to the solicitor for the party entitled, on filing with the accountant the material required by subrule (1) or (2) and the affidavit of the party stating that he consents to payment of the money directly to the solicitor rather than to him.	75.03(6) - W75.02(2) and 58.08, part, L.R. There is an issue here as to how much the client needs to be involved in authorizing payment directly to the solicitor. Should the affidavit of the solicitor be sufficient?	75.02 (2) Where costs are directed to be paid out of money in court, the solicitor for the party entitled to receive the costs is entitled to have the cheque drawn in his favour upon filing with the Accountant an affidavit by the solicitor that he is entitled to receive such costs, that he has not been paid his costs or any part thereof, and that the costs, in respect of which payment is sought, are justly due to him. If there has been a change in solicitor during the course of the litigation, that fact shall be shown in the affidavit, and the consent of both solicitors shall be filed.
Payment to Personal Representative (7) Where money or securities in court are to be paid out or transferred to a person named in an order or report who has died, the money or securities may be paid or transferred to the deceased person's personal representative on proof to the satisfaction of the accountant of the death of the person and of the authority of his personal representative.	75.03(7) - W75.02(5)	(5) Where money or securities in court are to be paid out or transferred to a person named in the judgment, order or report, such money or securities or any portion thereof for the time being remaining unpaid or untransferred may, on proof to the satisfaction of the Accountant of the death of such person whether before, on, or after the date of the judgment, order or report, and that his personal representatives are entitled thereto, be paid or transferred to such personal representatives or the survivors or survivor of them.
	Williston 75.02(6) paragraph omitted. - The devolution of executorship is covered by the law of estates, and subrule 7 should cover the situation by permitting the accountant to require satisfactory proof of the authority of the personal representative.	(6) Where money or securities in court are to be paid out of court or transferred to the personal representative of any person, such money or securities may, upon proof to the satisfaction of the Accountant of the death of any of them whether before, on or after the date of the judgment, order or report, be paid to the survivors or survivor of them.

REVISED RULES OF CIVIL PROCEDURE

Party under Disability

(8) An order for payment out of court of money in court to the credit of a person under disability may be obtained on motion to a judge by or on notice to the Official Guardian.

(9) In an order under subrule (6), the judge may fix the costs of the moving party and direct that they be paid out of the money in court directly to the moving party's solicitor.

COMMENTS

75.03(8)

- Based on W75.02(4). The working group suggests that there is no need for a separate procedure or document. Where the interested parties consent, a consent order can be obtained. Where there is no consent, the matter will have to be determined on motion to a judge in any event. Despite Lloyd Perry's request, the working group does not agree that only the Official Guardian should be in a position to prepare and present material to the judge, but the working group certainly does agree that the Official Guardian should be notified and have the opportunity to make submissions. In many cases, the persons seeking payment out are unrepresented, and then it would be entirely appropriate for the Official Guardian to make the motion.

75.03(9)

- Part of W75.02(4), L.R.

WILLISTON'S PROPOSED RULES

75.03(8)

75.02 (4) Where money is in court to the credit of a person under disability, it may be paid out upon filing with the Accountant a certified or authenticated copy of the fiat of a judge who may, in the fiat, direct payment of the costs of the application to the solicitor and dispense with the affidavit required by paragraph (2).

Revised Rules of Civil Procedure

57.06

Completion of Sale

(11) The purchaser may pay his purchase money or the balance thereof into court without order and, after the confirmation of the report on the sale, on notice to the party having carriage of the sale, he may, if he desires, obtain a vesting order.

(13) The purchase money may be paid out of court,

(a) on consent of the purchaser or his solicitor; or

(b) on proof to the Accountant that the purchaser has received a conveyance or vesting order of the property for which the money in question was paid into court.

Comments

Should Williston 57.07(10) and (11), revised rule 57.06(11) and (13), appear or be referred to here?

Williston's Proposed Rules

57.07 (10) The purchaser may pay his purchase money or the balance thereof into court without order, and, after the expiration of the time for appeal from the report on the sale, upon notice to the party having the conduct of the sale, he may, if he so desires, obtain a vesting order. Where possession is wrongfully withheld from the purchaser, either the purchaser or the party having the conduct of the sale may apply for an order against any party in possession.

(11) The purchase money shall not be paid out of court except upon consent of the purchaser or his solicitor or upon proof to the Accountant that the purchaser has received a conveyance or vesting order of the property for which the money in question was paid into court.

REVISED RULES OF CIVIL PROCEDURE

DISCHARGE OF A MORTGAGE

75.04(1) A person entitled to the discharge of a mortgage held by the accountant may leave with the accountant the required discharge with a requisition that it be executed.

(2) Where the accountant is satisfied that the money secured by the mortgage has been paid in full and that the discharge is in proper form, he shall execute the discharge.

(3) After executing the discharge, the accountant shall hand over all documents in his possession that relate to the mortgage in return for a receipt for the documents and shall assign any policy of insurance that he holds as collateral security for the mortgage to the person entitled to the discharge or as he directs in writing.

COMMENTS

75.04

- W75.03, L.R.

WILLISTON'S PROPOSED RULES

75.04

75.03 Discharge of a Mortgage

(1) Any person entitled to the discharge of a mortgage made to or vested in the Accountant may leave with the Accountant the required discharge with a request that it be executed.

(2) The Accountant shall satisfy himself that the money secured by the mortgage has been paid in full and that the proposed discharge is in proper form whereupon the discharge shall be executed by him.

(3) After executing the discharge, the Accountant shall deliver up all deeds and documents relating to the mortgage in his possession, in return for a receipt therefor, and assign any policy of insurance held by him as collateral security for the mortgage to the person entitled to the discharge or as he by writing directs.

Revised Rules of Civil Procedure

STOP ORDER

75.05(1) On motion without notice by a person who claims to be entitled to money in court or securities held by the accountant for the benefit of another person, the court may make a stop order (Form 75B) directing that the money or securities shall not be dealt with except on notice to the moving party.

(2) A person who has obtained an order under subrule (1) may make a motion on notice to all interested parties for an order for payment out.

Comments

75.05

- W75.04, L.R.

Williston's Proposed Rules

75.05(1)

75.04 Stop Order

(1) Any person claiming to be interested in, or to have a lien or charge upon, or an assignment of any money or securities in court, or invested in the name of the Accountant or any portion thereof or claiming to have the same applied towards the satisfaction of any judgment or execution against the person to whose credit such moneys or securities stand, or for whose benefit the same are held by the Accountant may, upon filing an affidavit verifying his claim, apply to the court without notice for a Stop Order (Form 75A) directing that such money or securities shall not be paid out or dealt with, except upon notice to the applicant.

(2) Any person who has obtained an order under paragraph (1), may apply to the court, on notice to all interested persons, for an order directing payment out.